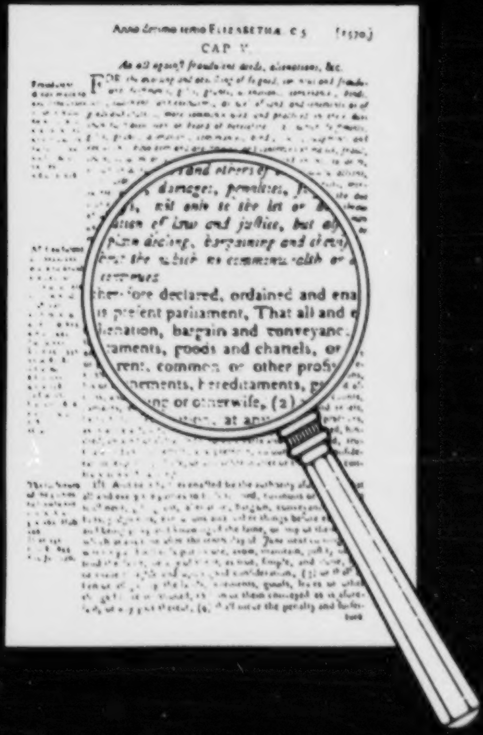
Law Reform
Commission of
Saskatchewan

A Handbook on the Saskatchewan Personal Property Security Act

by

Ronald C.C. Cuming and Roderick J. Wood

Saskatchewan



Anno decimo tertio ELIZABETHÆ. C. 5. [1570.]

CAP. V.

An act against fraudulent deeds, alienations, &c.

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INTRODUCTORY NOTE

The Law Reform Commission of Saskatchewan in July, 1977 issued Proposals for a Saskatchewan Personal Property Security Act. This report formed the basis for the Personal Property Security Act presently in force in this province. The report has been extensively relied on as a source of information concerning the various aspects of the Act, and has been quoted in many judicial decisions. The Commission has now decided to publish a handbook that would not only provide a basic explanation of the provisions of the Act, but would as well take into account the relevant case law.

Where appropriate, the authors of the handbook have pointed to weaknesses and ambiguities in the legislation and have expressed their opinions as to the soundness of the reasoning and analysis used by the courts when interpreting the Act. The opinions expressed are those of the authors and do not necessarily reflect the views of the Law Reform Commission of Saskatchewan.

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Douglas A. Schmeiser, Q.C.,
Chairman,
Law Reform Commission of Saskatchewan

A Handbook On The Saskatchewan Personal Property Security Act

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INTERPRETATION

1. This Act may be cited as *The Personal Property Security Act*.

2. In this Act:

(a) "accessions" or "accession goods" means goods that are installed in or affixed to other goods in such a manner or under such circumstances as to result in their becoming in law an accession to the other goods and, in relation to accession goods:

(i) "other goods" means goods to which accession goods are affixed or attached; and

(ii) "the whole" means the accession goods and the other goods;

(b) "account" means any monetary obligation not evidenced by chattel paper, an instrument or a security, whether or not it has been earned by performance;

(c) "building" includes a structure, erection, mine or work built, erected or constructed on or in land;

(d) "building materials" includes goods that are or become so incorporated or built into a building that their removal would necessarily involve the removal or destruction of some other part of the building and thereby cause substantial damage to the building, apart from the value of the goods removed, but does not include:

(i) goods that are severable from the building or land merely by unscrewing, unbolting, unclamping or uncoupling, or by some other method of disconnection; or

(ii) machinery installed in a building for use in the carrying on of an activity where the only substantial damage, apart from the value of the machinery removed, that would necessarily be caused to the building in removing the machinery therefrom is that arising from the removal or destruction of the bed or casing on or in which the machinery is set and the making or enlargement of an opening in the walls of

the building sufficient for the removal of the machinery;

(e) "chattel paper" means one or more writings that evidence both a monetary obligation and a security interest in or lease of specific goods or a security interest in specific goods and accessions, but does not include a security agreement providing for a security interest in specific goods and after-acquired goods other than accessions;

(f) "collateral" means personal property that is subject to a security interest;

(g) "consignment" means an agreement under which goods are delivered to a person, who in the ordinary course of his business deals in goods of that description, for sale, resale or lease, by a person who:

(i) in the ordinary course of his business deals in goods of that description; and

(ii) reserves a proprietary interest in the goods after they have been delivered;

but does not include an agreement under which goods are delivered to a person for sale or lease if the person is generally known in the area in which he carries on business to be selling or leasing goods of others;

(h) "consumer goods" means goods that are used or acquired for use primarily for personal, family or household purposes;

(i) "court" means Her Majesty's Court of Queen's Bench;

(j) "creditor" includes an assignee for the benefit of creditors, a trustee in bankruptcy and an executor, administrator or committee;

(k) "debtor" means a person who owes payment or other performance of the obligation secured, whether or not he owns or has rights in the collateral, and includes:

(i) the person who receives goods from another person under a consignment;

(ii) the lessee under a lease;

(iii) the assignor of an account or chattel paper;

(iv) the transferee of a debtor's interest in collateral; and

(v) any one or more of the persons mentioned in subclauses (i) to (iv) where the context so requires;

and, where a debtor is not the owner of the collateral, means the owner of the collateral, in any provision of this Act dealing with collateral, and the obligor, in any provision of this Act dealing with the obligation, and may include both where the context so requires;

(l) "default" means the failure to pay or otherwise perform the obligation secured when due or the occurrence of any event or set of circumstances whereupon, under the terms of the security agreement, the security becomes enforceable;

(m) "document of title" means any writing that purports to be issued by or addressed to a bailee and purports to cover any goods in the bailee's possession that are identified, or fungible portions of an identified mass, and that, in the ordinary course of business, is treated as establishing that the person in possession of it is entitled to receive, hold and dispose of the document and the goods it covers;

(n) "equipment" means goods that are not inventory or consumer goods;

(o) "financing change statement" or "financing statement" means a document, in the prescribed form, that is required or permitted to be registered pursuant to Part IV;

(p) "fixtures" means goods that are installed on or affixed to real property in such a manner or under such circumstances as to result in their becoming in law fixtures to the realty, but does not include building materials;

(q) "fungible", with respect to goods or securities, means goods or securities any unit of which is, by nature or

usage of trade, the equivalent of any other like unit, but goods or securities which are not fungible are deemed to be fungible for the purposes of this Act to the extent that, under the security agreement, unlike units are treated as equivalent;

(r) "future advance" means the payment of money, the provision of credit or the giving of value by the secured party pursuant to the terms of a security agreement, whether or not the secured party is obligated to pay the money, advance the credit or give the value, and includes all advances and expenditures made by the secured party for the protection, maintenance, preservation or repair of the collateral;

(s) "goods" means tangible personal property, other than choses in action and money, and includes fixtures, growing crops and the unborn young of animals, but does not include timber until it is cut or minerals until they are extracted;

(t) "indebtedness" means, when used with respect to a lease, obligation secured;

(u) "instrument" means a bill of exchange, note or cheque within the meaning of the *Bills of Exchange Act* (Canada), or any other writing that evidences a right to the payment of money and is of a type that in the ordinary course of business is transferred by delivery with any necessary endorsement or assignment, but does not include:

(i) a writing that is chattel paper;

(ii) a document of title; or

(iii) a security other than a security that is a bill of exchange or note within the meaning of the *Bills of Exchange Act* (Canada);

(v) "intangible" means all personal property, including choses in action, that is not goods, chattel paper, documents of title, instruments or securities;

(w) "inventory" means goods:

(i) that are held by a person for sale or lease, or that have been leased;

(ii) that are to be furnished or have been furnished under a contract of service; or

(iii) that are raw materials, work in process or materials used or consumed in a business or profession;

(x) "judge" means a judge of the court;

(y) "lease for a term of more than one year" includes:

(i) a lease for an indefinite term even though the lease is determinable by one or both parties within one year of its execution;

(ii) a lease for a term of one year or less that is automatically renewable or that is renewable at the option of one of the parties or by agreement for one or more terms, the total of which may exceed one year;

(iii) a lease initially for less than one year, where the lessee retains uninterrupted or substantially uninterrupted possession of the goods leased for a period in excess of one year after the day he first acquired possession of the goods, and the lease is deemed to be a lease for more than one year as soon as the lessee's possession extends beyond one year;

but does not include:

(iv) a lease transaction involving a lessor who is not regularly engaged in the business of leasing goods;

(v) a lease of any prescribed goods, regardless of the length of the term of the lease;

(z) "money" means a medium of exchange authorized by the Parliament of Canada as part of the currency of Canada or adopted by a foreign government as part of its currency;

(aa) "obligation secured" means, when determining the amount payable under a lease, the amount originally contracted to be paid under the lease, any other amounts payable pursuant to the terms of the lease and any other

amount required to be paid by the lessee to obtain full ownership of the collateral;

(bb)"pawnbroker" means a person who engages in the business of granting consumer credit and who takes a security interest in the form of a pledge of goods to secure the consumer credit or who purchases goods under an agreement or undertaking, express or implied, that those goods may be afterwards repurchased or redeemed on terms, and "consumer credit" means credit granted to an individual for personal, family or household purposes by a person or organization in the business of granting credit, and, unless the agreement under which credit is granted or the context of the transaction indicates otherwise, a grant of credit is presumed to be a grant of consumer credit;

(cc)"person" includes an individual, partnership, association, body corporate, trustee, executor, administrator or legal representative;

(dd)"prescribed" means prescribed in the regulations;

(ee)"proceeds" means identifiable or traceable personal property in any form or fixtures derived directly or indirectly from any dealing with the collateral or proceeds therefrom, and includes insurance payments or any other payments as indemnity or compensation for loss of or damage to the collateral or proceeds therefrom, or any right to such payment, and any payment made in total or partial discharge of an intangible, chattel paper, instrument or security; and money, cheques and deposit accounts in banks, credit unions, trust companies or similar institutions are cash proceeds and all other proceeds are non-cash proceeds;

(ff)"purchase" includes taking by sale, lease, discount, negotiation, mortgage, pledge, lien, issue or reissue, gift or any other voluntary transaction creating an interest in personal property;

(gg)"purchase-money security interest" means:

(i) a security interest that is taken or reserved by a seller, lessor or consignor of personal property to secure payment of all or part of its sale or lease price;

(ii) a security interest that is taken by a person who gives value for the purpose of enabling the debtor to acquire rights in or to the personal property, to the extent that the value is applied to acquire such rights;

(iii) the interest of a lessor of goods under a lease for a term of more than one year; or

(iv) the interest of a person who delivers goods to another person under a consignment;

(hh) "purchaser" means a person who takes by purchase;

(ii) "registrar" means the Registrar of Personal Property Security appointed under section 42;

(jj) "registry" means the Personal Property Registry established under section 41;

(kk) "secured party" means a person who has a security interest and, where a security agreement is embodied in a trust indenture, means the trustee;

(ll) "security" means a share, stock, warrant, bond, debenture, debenture stock or the like issued by a body corporate or other person that is:

(i) in a form recognized in the area in which it is issued or dealt with as evidencing a share, participation, or other interest in property or in an enterprise, or that evidences an obligation of the issuer; and

(ii) of a type which, in the ordinary course of business, is transferred by delivery with necessary endorsement, assignment, registration in the books of the issuer or agent for the issuer, or compliance with the restrictions on transfers;

(mm) "security agreement" means an agreement that creates or provides for a security interest, and includes a document evidencing a security agreement when the context permits;

(nn) "security interest" means an interest in goods, documents of title, securities, chattel paper, instruments, money or intangibles that secures payment or perform-

ance of an obligation and is deemed to include:

(i) an interest arising from an assignment of accounts or transfer of chattel paper;

(ii) the interest of a person who delivers goods to another person under a consignment; and

(iii) the interest of a lessor under a lease for a term of more than one year;

notwithstanding that the interests described in subclause (i) to (iii) may not secure payment or performance of an obligation, but does not include the interest of a seller who has shipped goods to a buyer under a negotiable bill of lading to his own order or to the order of his agent, unless the parties have otherwise evidenced an intention to create or provide for a security interest;

(oo)"specific goods" means goods identified and agreed upon at the time a security agreement in respect to those goods is made;

(pp)"trust indenture" means any deed, indenture or document, however designated, including any supplement or amendment thereto, by the terms of which a body corporate issues or guarantees, or provides for the issue or guarantee of, debt obligations and in which a person is appointed as trustee for the holder of the debt obligations issued, guaranteed or provided for thereunder and secured by a security interest;

(qq)"value" means any consideration sufficient to support a simple contract and includes an antecedent debt or liability.

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1. Definitions
2. Categories of Collateral and Table of Special Rules

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1. Definitions

(a) "accessions"
This definition relates primarily to section 37 which permits the taking and retention of a security interest in goods which are

attached to other goods. The definition incorporates the common law test of accession.

(b) "account"
An account is a sub-category of "intangible" defined in section 2(v). The more traditional term "book debt" has been replaced by "account" since in many cases debts are no longer recorded in the books but rather on computer tapes or discs, and since business people now use the term "accounts receivable" when referring to monetary obligations arising out of sale of goods or services. In order to fall within the definition, a right need not be a current debt; and in order to be assigned an account need not be earned.

(c) "building"
This definition relates exclusively to the definition of "building materials" in section 2(d).

(d) "building materials"
This definition relates exclusively to the definition of "fixtures" in section 2(p), which provides that "fixtures" do not include building materials. See the commentary accompanying section 36.

(e) "chattel paper"
This definition designates a type of collateral not previously recognized before the enactment of the PPSA. See also the definition of "specific goods" in section 2(oo). See the commentary accompanying section 31.

(f) "collateral"
The basic categories of collateral identified in the Act are goods, documents of title, securities, instruments, chattel paper, money and intangibles. See the discussion under the next heading: 2. Categories of Collateral and Table of Special Rules.

(g) "consignment"
The definition identifies a type of non-security transaction that falls within the conflicts, perfection and priority provisions of the Act. See sections 2(nn) and 3(b). The definition does not encompass consignments where either the consignor or the consignee is not in the business of dealing with the goods consigned and consignments where the consignee is generally known to be acting in such capacity and is therefore not in a position to deceive any third party as to the ownership of the goods consigned to him. If the consignment is in substance a security agreement, the exclusions are inapplicable and it is treated like

any other security agreement. See the commentary accompanying section 3.

(h) "consumer goods"
This definition identifies a sub-category of "goods".

(i) "court"
The Court of Queen's Bench is given a broad jurisdiction to determine priorities and regulate the rights and remedies exercised by the secured party against the debtor on default. See Part V, and in particular section 63.

(j) "creditor"
This definition encompasses both secured and unsecured creditors, as well as representatives of creditors and the trustee in bankruptcy.

(k) "debtor"
This definition gives a much broader scope to the term "debtor" than it has in common English usage. In the context of secured debt, a debtor is usually someone who has incurred an obligation and who has given a security interest in his personal property to secure the obligation. However, the definition extends the scope of the term well beyond this type of debtor.

The definition makes it clear that a person may be a debtor even though he has incurred only a secondary liability. When one person has incurred the primary obligation and a second person has provided collateral to secure that obligation, the second person is also a debtor since he "owes payment or other performance of the obligations secured" to the extent that his property can be used as a source of repayment of the obligation. The definition also encompasses a person who has contractually guaranteed the repayment of the obligation but has not given a security interest in his personal property.

While the definition includes a primary debtor, a person who has provided collateral to secure the debt and a person who has guaranteed repayment of the obligation, it indicates that it is not intended that the use of the word "debtor" in a particular section necessarily refers to all such persons. Each section in which the term appears must be examined carefully to determine from the context of the section what type or types of "debtors" are being referred to.

The definition encompasses consignees, lessees and assignors of accounts or chattel paper. Non-security transactions do not involve a debtor-creditor relationship. The section therefore deems such parties to be debtors for the purposes of the conflicts, perfection and priority sections of the Act.

(l) "default"
The consequences of default are generally set out in Part V of the Act.

(m) "document of title"
This definition provides a description of a type of collateral called documents of title, the most common of which are bills of lading and warehouse receipts. The Act draws important distinctions between negotiable and non-negotiable documents of title. The Act does not define which are considered to be negotiable, but leaves this to be determined by the common law. See the commentary accompanying section 31. The only negotiable documents of title recognized in Saskatchewan are order bills of lading.

(n) "equipment"
This definition identifies a sub-category of "goods". It is a residual definition in that goods which are not "consumer goods" (see section 2(h)) or "inventory" (see section 2(w)) will be classed as "equipment".

(o) "financing change statement"
The definition relates primarily to the sections providing for the amendment, renewal and discharge of financing statements. See sections 45-50 and The Personal Property Regulations, sections 15-29.

(p) "fixtures"
This definition relates primarily to section 36 which permits the taking and retention of security interests in goods which become affixed to land. As to registration of a notice respecting fixtures in the land titles office see section 54. See also the definition of "building materials in section 2(d).

(q) "fungible"
This definition relates to the definition of "document of title", and also relates to the duty of a secured party in possession of the collateral. See section 17(2)(d).

(r) "future advance"
Special rules governing the status of future advances can be

found in sections 14, 20(2) and 35(4).

(s) "goods"
See the definitions of "consumer goods" (section 2(h)), "equipment" (section 2(n)) and "inventory" (section 2(w)).

(t) "indebtedness"
This definition appears in section 60. See also section 2(aa).

(u) "instrument"
This definition identifies a category of collateral. It is in fact a residual definition. An instrument is any document that embodies a payment obligation and that is transferrable by delivery of the document with any necessary endorsement, other than chattel paper, a document of title or a security, which are separate types of collateral under the Act. See sections 2(e), 2(m) and 2(11).

(v) "intangibles"
This definition identifies intangibles by elimination. Because the section does not expressly exclude "money", it might be argued that "money" is to be considered an intangible. However, other sections confirm that this was not the intention of the Legislature. The definition of money in section 2(z) by necessity refers to tangible personal property. Further, section 24(1)(f) provides that a security interest in money may be perfected through the secured party taking possession of it. The specific reference to money in this section necessarily leads to the conclusion that money is not an intangible, since a security interest in an intangible cannot be perfected by possession.

(w) "inventory"
This definition identifies a sub-category of "goods". The definition expands the ordinary meaning of the word "inventory" to include leased goods, goods furnished under a service contract, raw materials and materials used or consumed in a business.

(x) "judge"
See the definition of "court" in section 2(i).

(y) "lease for a term of more than one year"
This definition identifies one of the non-security transactions which fall within the scope of the perfection and priority sections of the Act. See sections 2(nn) and 3(b). The essential objective of the definition is to encompass leases which have a term of more than one year or which in all likelihood will extend beyond the

term of one year. See the commentary accompanying section 3.

A transaction which is in substance a security agreement although labelled a lease is not within the scope of this definition. It would be treated like any other security agreement. See section 3(a).

(z) "money"
This definition identifies a separate category of collateral. See the commentary accompanying section 2(v).

(aa) "obligation secured"
This definition relates primarily to sections 36(9), 37(9), 59(1)(b), 59(12), 61(1), 61(3), 61(7), and 62(1)(a). Its purpose is to prescribe the amount which must be paid to obtain ownership of goods under a transaction which is in the form of a lease, but which is in substance an instalment sales contract and therefore a security agreement. For example, the definition prevents the argument that the lessee-buyer need not pay an amount specified in the transaction as a pre-requisite to the exercise of an option to purchase when he seeks to redeem his interest in the leased goods under section 62(1)(a).

(bb) "pawnbroker"
This definition relates exclusively to section 55(2) which provides that Part V of the Act does not apply to transactions between a pledgor and a pawnbroker.

(cc) "person"

(dd) "prescribed"

(ee) "proceeds"
This definition relates primarily to sections 28 and 34. The definition describes a category of collateral on the basis of its origins. Any identifiable or traceable personal property which is a product of any dealing with original collateral or proceeds falls within the scope of the definition. For example, a secured party may have a security interest in a dealer's inventory of automobiles. When the dealer sells his automobiles, personal property in one or more forms may be derived, including money, accounts, chattel paper, instruments or automobiles taken as trades. This property is "proceeds" of the inventory of automobiles which is the original collateral under the security agreement.

In order for personal property to be "proceeds" it must be possible to identify it as property derived from a dealing with the original collateral or proceeds or must be property in which the interest in the original collateral can be traced. Since the Act does not provide tracing rules, it is intended that the appropriate tracing rules of equity will be employed. See generally the commentary accompanying section 28.

The definition includes personal property derived from any dealing with "proceeds". In other words, the concept of "proceeds" is not limited to personal property derived from dealings with original collateral. The definition also includes insurance proceeds. Since insurance payments are not derived from a "dealing" with collateral or proceeds, it is necessary to extend the definition to encompass such payments.

(ff) "purchase"
This term has a much broader meaning than it has in common English usage. It is not restricted to a transaction of sale, but includes an acquisition of any type of interest under a consensual transaction. See, for example, sections 31(3), 31(5) and 37(2).

(gg) "purchase-money security interest"
This definition relates primarily to sections 21 and 34. Two types of transactions are encompassed in the definition: instalment sales contracts under which the obligation of the buyer is secured in whole or in part by a security interest taken by the seller in the collateral involved; and a loan transaction where money is loaned or value is given in order to enable the borrower to acquire rights in or to the collateral and where the lender is given a security interest in the collateral. It is not enough to show that the debtor obtained the loan from a secured party and acquired rights in or to property of the kind described in a security agreement. In order for a security interest to qualify under subclause (ii) the loan must have been made for the purposes of acquiring rights in or to the collateral and must in fact have been used for that purpose. It is necessary to establish the nexus between the purpose and use of the loan on the one hand and the acquisition of the interest in or to the collateral on the other. See the commentary accompanying section 34.

The interests of lessors under non-security leases and consignors under non-security consignments approximate those of sellers under secured instalment sales contracts. Consequently, owners of these interests are treated as having purchase-money security interests.

(hh) "purchaser"
See the definition of "purchase" in section 2(ff).

(ii) "registrar"

(jj) "registry"

(kk) "secured party"
This definition extends the natural meaning of the term "secured party" to include a trustee under a trust indenture who acts on behalf of the debenture holders. See also section 56(3) which provides that in sections 17, 56 to 58, subsections 59(1) to (3) and (5) to (15) and sections 60 to 62 "secured party" includes a receiver and a receiver-manager. This ensures that the receiver or receiver-manager is brought within the Act even though such person is not the alter ego of the secured party (as where a receiver-manager is appointed by the court, or where the security agreement provides for appointment of a receiver-manager as agent for the debtor).

(ll) "security"
This definition identifies a category of collateral. See the commentary accompanying section 31.

(mm) "security agreement"
The definition encompasses both the legal concept and the writing that evidences its presence in the particular case. A security agreement need not be in any particular form. In fact, it does not even have to be in writing if a pledge is involved or if the parties intend it to be enforceable only inter partes. See section 10(1).

(nn) "security interest"

Although the concept of a "security interest" is essential to the entire system contained in the Act, the term is defined in a very general way. Some elucidation of the nature of the interest involved can be obtained from sections 3 and 12. The types of transactions enumerated in section 3 traditionally involve the transfer of some form of proprietary interest by the debtor to the secured party. However, it is incorrect to conclude that the creation of a security interest necessarily involves a transfer of a legal or equitable title to the secured party. Section 3 makes this clear. However, for a security interest to come into existence or to "attach" a debtor must have "rights in the collateral". See section 12(1)(b), and the commentary accompanying section 12. A security interest may be found to exist any time one person, the debtor, agrees that another person, the secured party, is to have an interest in property in which the debtor has rights so as to provide an alternative source of payment or compensation to the secured party in case an obligation owing by the debtor to the secured party is not discharged. It is not important for the purposes of the Act to identify the nature of the proprietary interest involved since nothing turns on this. What is important is that a proprietary interest is given as a guarantee of discharge of the obligation.

The extension of the definition to include interests of lessors under non-security leases, consignors under non-security consignments and interests arising from non-security transfers of accounts or chattel paper complements section 3(b) which brings these transactions within the conflict, perfection and priority provisions of the Act.

The definition provides that when goods are shipped under an order bill of lading the interest of the seller is not to be treated as a security interest unless there is some additional indication that the parties intended a more elaborate secured financing relationship. While technically the seller's interest under an order bill of lading is an interest in goods that secures performance of an obligation, there is no good reason to bring this type of arrangement within the scope of the Act unless the parties indicate an intention to do so. For example, in the event of non- payment of the purchase price, the reasonable expectations of the seller are that he can refuse delivery of the goods and dispose of them in the market. However, if the transaction were to be treated as a security agreement he would be required to comply with the elaborate system of Part V of the Act, and this would lead to a commercially unrealistic result.

(oo) "specific goods"
This definition relates to the definition of "chattel paper" in section 2(e).

(pp) "trust indenture"
This definition relates primarily to sections 2(kk), 50(6)-(7), and 53(4).

(qq) "value"
Under the definition, value is not equivalent to common law

consideration in that it includes an antecedent debt or liability. The term "new value" is used in the Act to indicate a situation in which an antecedent debt is not sufficient for the particular priority status. See sections 26(1), 29(3), 30(5), 31(5) and 34(4).

2. Categories of Collateral and Table of Special Rules

The Act divides collateral into a number of categories. These may be listed as follows:

- goods (see also "consumer goods", "equipment" and "inventory")
- documents of title
- chattel paper
- money
- securities
- instruments
- intangibles (see also "account")

The category of goods is sub-divided into consumer goods, inventory and equipment. An account is a particular kind of intangible. In addition the Act defines a category of collateral known as proceeds. This type of collateral comes into existence when the debtor deals with the original collateral.

In many cases the Act does not draw a distinction on the basis of the type of collateral. There are, however, a number of special rules which apply only to particular categories of collateral. A table of sections where such special rules are stated follows:

GOODS

(See also: consumer goods, equipment, inventory, crops, minerals)

Section	
2(s)	Definition of "goods"
2(nn)	"security interest" deemed to include a consignment of goods and a lease of goods for a term of more than one year
3	Act applies to a consignment of goods and a lease of goods for a term of more than one year notwithstanding that it does not secure performance of an obligation

SECTION 2

Section	
5(1)	Conflict of laws: validity and perfection
6	Conflict of laws: goods to be brought into jurisdiction
8(1)	Conflict of laws: priority rules
12(2)	When debtor has rights in goods purchased under agreement to sell, lease or consignment
12(3)	When debtor has rights in certain types of goods (crops, young of animals, oil, gas and other minerals, timber)
15	Application of sales law
20(1)(e)	Unperfected security interest subordinate to certain transferees of goods
24	Perfection by possession
26(2)(b)	Temporary perfection of security interest in goods surrendered to debtor by bailee
27	Perfection of goods held by bailee
29	Rules when goods returned or repossessed
30	When buyer or lessee of goods takes free of security interest
32	Priority of certain liens on goods
36	Goods that are affixed to land
37	Goods that become accessions
38	Commingled goods
54	Fixture notice in land titles system

CONSUMER GOODS

Section	
2(h)	Definition of "consumer goods"
30(2)	When buyer or lessee of consumer goods takes free of security interest
31(5)(a)	Security interest in proceeds of consumer goods subordinate to certain purchasers of chattel paper

And see section 5(1)(i) of The Personal Property Regulations which provides for serial number registration of motor vehicles, trailers and mobile homes, and for registration by Ministry of Transport numbers for airplanes, when the goods are held by the debtor as consumer goods.

EQUIPMENT

Section	
2(n)	Definition of "equipment"
7	Conflict of laws: validity and perfection: mobile goods classified as equipment
8(2)	Conflict of laws: priority rules: mobile goods classified as equipment
31(5)(a)	Security interest in proceeds of equipment subordinate to certain purchasers of chattel paper
58(b)	Secured party with registered security interest deemed to take possession by rendering equipment unusable

And see section 5(1)(i) of The Personal Property Regulations which provides for serial number registration of motor vehicles, trailers and mobile homes, and for registration by Ministry of Transport numbers for airplanes, when the goods are held as equipment.

INVENTORY

Section	
2(w)	Definition of "inventory"
7	Conflict of laws: validity and perfection: mobile goods classified as inventory
8(2)	Conflict of laws: priority rules: mobile goods classified as inventory
31(5)(b)	Security interest in proceeds of inventory subordinate to purchasers of chattel paper
34(2),(3) & (4)	Special rules for purchase-money security interest in inventory

CROPS*

Section	
12(3)	Time of attachment
13(2)	Attachment of security interest in crops under an after-acquired property clause restricted
34(6)	Priority between perfected security interests in crops

MINERALS*

Section	
7(6)	Conflict of laws: minerals
12(3)	Time of attachment

*Note that crops and minerals are particular types of "inventory".

DOCUMENTS OF TITLE

Section	
2(m)	Definition of "documents of title"

Section	
5(1)	Conflict of laws: possessory security interest in negotiable documents of title: validity and perfection
7(1)	Conflict of laws: non-possessory security interest in negotiable documents of title: validity and perfection
8(1)	Conflict of laws: priority rules
20(1)(e)	Unperfected security interest subordinate to certain transferees of documents of title
24	Perfection by possession of negotiable documents of title
26	Temporary perfection of negotiable documents of title
27	Perfection of goods held by a bailee
31(4)	Priority of holder of negotiable document of title
56(6)	Enforcement of rights on default

CHATTEL PAPER

Section	
2(e)	Definition of "chattel paper"
5(1)	Conflict of laws: possessory security interest in chattel paper: validity and perfection
7(1)	Conflict of laws: non-possessory security interest in chattel paper: validity and perfection
8(1)	Conflict of laws: priority rules
17(1)	Care of collateral: preservation of rights
20(1)(e)	Unperfected security interest subordinate to certain transferees of chattel paper

24	Perfection by possession
29(3) & (5)	Goods returned or repossessed: chattel paper financer acquires security interest in goods: perfection and priority of the security interest in the goods
31(5)	Security interest in proceeds of goods subordinate to certain purchasers of chattel paper
40	Rights of assignee
57	Collection rights of secured party

INSTRUMENTS

Section	
2(u)	Definition of "instrument"
5(1)	Conflict of laws: possessory security interest in instruments: validity and priority
7(1)	Conflict of laws: non-possessory security interest in instruments: validity and perfection
8(1)	Conflict of laws: priority rules
17(1)	Care of collateral: preservation of rights
20(1)(e)	Unperfected security interest subordinate to certain transferees of instruments
24	Perfection by possession
26	Temporary perfection of security interest in instruments
31(2)	Security interest in instrument subordinate to creditor to whom instrument delivered in payment of debt
31(3)	Security interest in instrument subordinate to certain purchasers
57	Collection rights of secured party

MONEY

Section	
2(z)	Definition of "money"
5(1)	Conflict of laws: possessory security interest in money: validity and perfection
7(1)	Conflict of laws: non-possessory security interest in money: validity and perfection
8(1)	Conflict of laws: priority rules
24	Perfection by possession
31(1)	Priority of holder of money
31(2)	Security interest in money subordinate to creditor to whom money delivered in payment of debt

SECURITIES

Section	
2(11)	Definition of "security"
5(1)	Conflict of laws: possessory security interest in securities: validity and perfection
7(1)	Conflict of laws: non-possessory security interest in securities: validity and perfection
8(1)	Conflict of laws: priority rules
17(1)	Care of collateral: preservation of rights
20(1)(e)	Unperfected security interest subordinate to certain transferees of securities
24	Perfection by possession
26	Temporary perfection of security interest in securities

31(3)	Security interest in securities subordinate to certain purchasers

INTANGIBLES
(See also: Accounts)

Section	
2(v)	Definition of "intangible"
7(1)	Conflict of laws: validity and perfection
8(2)	Conflict of laws: priority rules
20(1)(e)	Unperfected security interest subordinate to certain transferees of intangibles
21(1)(b)	Priority of purchase-money security interest in intangibles
29(4) & (5)	Goods returned or repossessed: intangibles financer acquires security interest in goods: perfection and priority of the security interest in the goods
34(1)(b)	Priority of purchase-money security interest in intangibles
40	Rights of assignee
57	Collection rights of secured party

ACCOUNTS

Section	
2(b)	Definition of "account"
2(nn)	"security interest" deemed to include an assignment of accounts
3	Act applies to an assignment of accounts notwithstanding it does not secure performance of an obligation
4	Certain assignments of accounts excluded from Act

Section	
20(1)(e)	Unperfected security interest subordinate to certain transferees of accounts
34(4)	Purchase-money security interest in proceeds of inventory subordinate to prior registered security interest in accounts

APPLICATION OF ACT

3. Subject to sections 4 and 55, this Act applies to every security agreement, without regard to its form and without regard to the person who has title to the collateral, that creates a security interest including, but without limiting the generality of the foregoing:

(a) a chattel mortgage, conditional sale, floating charge, pledge, debenture, trust indenture or trust receipt, lease, assignment, consignment or transfer of chattel paper; and

(b) an assignment of accounts, transfer of chattel paper, consignment, or a lease for a term of more than one year, notwithstanding that such interests may not secure payment or performance of an obligation.

Definitional Cross References:

"account" - s.2(b)
"chattel paper" - s.2(e)
"collateral" - s. 2(f)
"consignment" - s.2(g)
"lease for a term of more than one year" - s.2(y)

"person" - s.2(cc)
"security agreement" - s.2(mm)
"security interest" - s.2(nn)
"trust indenture" - s.2(pp)

1. Transactions to which the Act Applies a Substance Test
2. Deemed Security Agreements
3. Unconventional Security Devices
4. Security Agreements and Trusts

1. Transactions to which the Act Applies a Substance Test

The Act encompasses two types of transactions: true security agreements and deemed security agreements. A "substance" test is used in order to determine whether the transaction is a true security agreement. The actual label used by the parties is irrelevant: a transaction termed a lease is nevertheless a security agreement if its purpose is to secure payment or performance of an obligation. Nor is any particular form of words required in order to create a security agreement. The Act eliminates the need to recite in the agreement that the debtor transfers title to the secured party or that a seller retains title to the goods sold. However, it may be advantageous to include a title transfer or title retention clause, since title remains an important consideration in matters not regulated by the Act.[1]

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[1] It has been suggested that a title retention security agreement places the secured party in a more advantageous position when his interest is in conflict with a section 178 interest. See *Rogerson Lumber Co. Ltd.* v. *Four Seasons Chalet Ltd.* (1980), 113 D.L.R. (3d) 671 (Ont. C.A.). And see J.S. Ziegel, "Interaction of Personal Property Security Legislation and Security Interests under the Bank Act" (1986), 12 *Can. Bus. L.J.* 73 for a discussion of the *Rogerson* decision. But see R.C.C. Cuming and R.J. Wood, "Compatibility of Federal and Provincial Personal Property Security Law" (1986), 65 *Can. Bar Rev.* 267.

Note also that section 89(1) of the Indian Act R.S.C. 1970, c. I-6 provides that the personal property of an Indian or Band situated on a reserve is not subject to a mortgage in favour of anyone except an Indian. However, section 89(2) provides that a person who sells to an Indian or Band a chattel under a title retention agreement may exercise his right of repossession.

Section 3(a) enumerates a non-exclusive list of traditional pre-PPSA security devices. It does so merely to confirm that they are within the scope of the Act. It remains open for the parties to continue using these devices. Their use will not, however, have the effect of invoking the traditional law governing such transactions. For example, the use of a floating charge in a security agreement will not have the effect of resurrecting the notion of "crystallization" and the peculiar priority rules that governed this device. Instead, the priority rules that govern will be those set out in the PPSA. The parties are not restricted to these older devices. Indeed, many financial institutions have developed modern security agreements under which the debtor merely grants a security interest to the secured party in specified collateral, or in all his present and after-acquired personal property.

The "substance" test prescribed by section 3 brings within the scope of the Act not only the traditional forms of security agreement, but also types of transactions that under prior law were not generally treated as security agreements. From a purely practical point of view, the two most important of these are leases and consignments.

A conclusion that a lease or consignment falls within or outside the scope of the Act is of much less importance under Saskatchewan law than it is under the law of Ontario or Manitoba or of the states of the United States. This difference results from a provision contained in the Act (section 3(b)), but not contained in corresponding legislation in these other jurisdictions, that brings within the scope of the conflicts, perfection and priority provisions of the Act (but not Part V Default Rights and Remedies) non-security consignments as defined in section 2(g), and non-security leases for a term of more than one year as defined in section 2(y). In practice, characterization of a transaction as a true consignment or a security consignment or as a true lease or a security lease is relevant only when issues involving *inter partes* rights and obligations upon breach of the contract by the consignee or lessee are involved. If the transaction is a security agreement, most of these issues will be regulated by the elaborate system prescribed by Part V of the Act. If the transaction is a true consignment or a true lease, the common law applies.

It is conceptually possible to have a lease for a term of one year or less characterized as a security agreement and therefore subject to the entire Act. However, few short-term leases have the characteristics of a financing transaction. Those that do not fall entirely outside the scope of the Act.

At common law, neither a consignment nor a lease was viewed as a secured credit sale of goods unless or until title in the goods vested in the lessee or consignee.[2] The Conditional Sales Act,[3] which defined conditional sales contracts as including agreements for the hiring of goods under which it is agreed the hirer becomes or has the option of becoming owner of the goods on compliance with the terms of the contract, did modify the common law position. The presence of an option in a lease meant that it would be characterized as a conditional sales contract. Section 3 of The Personal Property Security Act embodies an approach different from that of the common law and prior legislation.

The substance test of section 3 ignores both title and form as factors in characterizing transactions as falling within or outside the scope of the Act. If a transaction is one under which a party gives or recognizes that someone else has an interest in his property in order to secure payment or performance of an obligation, it is a security agreement. A conditional sales contract generally provides that the title and property in the goods sold remains in the seller until the entire purchase price is paid. Nevertheless, since under section 3 the retention of title and property is irrelevant, this type of an agreement is treated under the Act as being one in which property in the goods vests in the buyer subject to the seller's security interest. Substance rather than form or contractual provisions relating to title is the central consideration.

The same approach is used when the issue involves the characterization of a lease or a consignment. If the commercial realities (i.e., the substance of the transaction) point to a secured financing arrangement rather than to a bailment in the case of a lease, or to an agency relationship in the case of a consignment, then the transaction is a security agreement even though it takes the form of a lease or consignment, and even though there is no provision vesting title in the lessee or consignee. Likewise, the fact that a lease provides for a purchase option exercisable by the lessee does not by itself dictate (as it did under The Conditional Sales Act) that the transaction is to be regarded as a security lease.

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[2] *Helby* v. *Matthews*, [1885] A.C. 471 (H.L.).

[3] R.S.S. 1978, c. C-25, s.2(f); repealed S.S. 1979-80, c. 16, s.2.

The jurisprudence dealing with the characterization of consignments as true consignments or as security agreements governed by a personal property security act is sparse.[4] However, there is a significant body of case law involving the characterization of consignments in other contexts which provides valuable guidance. In each case it will be a matter of determining whether in total the several features of the relationship between the consignor and the consignee are preponderantly those characteristic of a contract between a principal and an agent or of a secured credit sales arrangement.[5]

It is too early in the development of Canadian case law involving the characterization of chattel leases as true leases or security agreements to identify precisely what indicia will be consistently relied upon by the courts. There is evidence, however, that Canadian courts will be prepared to take guidance from the very substantial body of American case law dealing with characterization of chattel leases.[6]

Some of the decisions of the Ontario courts purport to be applying the "intention" test of characterization prescribed by the Ontario Act.[7] As noted above, the Saskatchewan Act prescribes a substance test. However, there is little evidence that in result the outcome is different under the two tests. In practice a substance test is used by most courts.[8]

The general approach is to examine carefully the relationship between the lessor and lessee in order to determine whether or not in that relationship the standard indicia of a secured credit arrangement are to be found.[9] If the lessee is required to pay what is the equivalent of the lessor's capital investment plus a credit charge at the rate existing at the date of the agreement, there is strong evidence of a secured sale.[10] A clause in a lease giving to the lessee the option to purchase the goods at less than their then market value as determined at the date of execution indicates that the lessee has acquired an equity in the goods through his lease payment, not unlike that which he would have acquired had he entered into an instalment purchase contract. However, the fact that at the end of a lease term roughly equivalent to the useful life of the goods the lessee can purchase the goods at their then market value does not prevent characterization of the transaction as a security agreement.[11] Evidence that the lessee bears some of the obligations of ownership such as the requirement to repair and insure the goods provides some persuasive but not determinative indication of a security agreement.[12] In one case, the court was prepared to look at the business activities of the lessor to determine whether or not it had the facilities and methods of operating of a lessor and to take this into consideration in making the determination.[13] Unlike their counterparts in the United States, Canadian courts so far have refused to view "open ended" leases as security agreements notwithstanding that under such leases the lessor is guaranteed recovery of his full investment and a credit charge.[14]

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[4] *Re Toyerama Limited* (1980), 34 C.B.R. (N.S.) 153 (Ont. S.C.); *Re Stephanian's Persian Carpets Limited* (1979), 34 C.B.R. (N.S.) 35 (Ont. S.C.). For an analysis of these cases see B. Colburn, "Consignment Sales and the Personal Property Security Act" (1981- 82), 6 *Can. Bus. L.J.* 40, at 65-69. See also *Seven Limers Coal & Fertilizer Co. Inc.* v. *Hewitt* (1985), 52 O. R. (2d) 1 (Ont. C.A.).

[5] Colburn, *ibid.*, at 51-63.

[6] See generally, R.C.C. Cuming "True Leases and Security Leases Under Canadian Personal Property Security Acts" (1982-83), 7 *Can. Bus. L.J.* 251.

[7] *Re Speedrack Limited* (1980), 11 B.L.R. 220, 33 C.B.R. (N.S.) 209 (Ont. S.C.); *Re Federal Business Development Bank and Bramalea* (1983), 144 D.L.R. (3d) 410 (Ont. H.C.J.).

[8] See Cuming, *supra*, footnote 6, at 262-266.

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[9] *Re Speedrack Limited* (1980), 11 B.L.R. 220, 33 C.B.R. (N.S.) 209 (Ont. S.C.) *Misener Financial Corporation* v. *General Home Systems Ltd.* (1985), 27 B.L.R. 247 (Ont. H.C.J.); *Re 488723 Ontario Inc. (R.P.M. Motors)* (1985), 55 C.B.R. (N.S.) 311 (Ont. S.C.); *Standard Finance Corporation Limited* v. *Coopers & Lybrand Limited*, [1984] 4 W.W.R. 543 (Man. Q.B.); *Federal Business Development Bank* and *Bramalea Ltd.* (1983), 144 D.L.R. (3d) 410, (Ont. H.C.J.); *Donnelly* v. *International Harvester Credit Corporation of Canada Ltd.* (1983), 2 P.P.S.A.C. 290 (Ont. Co. Ct.); *GATX Corporate Leasing Inc.* v. *William Day Construction Ltd.* (1986), 6 P.P.S.A.C. 188 (Ont. S.C.).

[10] *Re Econo Transport Inc.* (1982), 43 C.B.R. (N.S.) 230 (Ont. S.C.); *Leaseway Autos Ltd.* v. *Sinco Sportswear Ltd.* (1986), 45 Sask. R. 254 (Sask. Q.B.).

[11] *Standard Finance Corporation* v. *Coopers & Lybrand*, [1984] 4 W.W.R. 543 (Man. Q.B.). Compare *Re Sun-Panoramic Inc.* (1985), 58 C.B.R. (N.S.) 36 (Ont.S.C.).

[12] Re 488723 Ontario Inc. *(R.P.M. Motors)* (1985), 55 C.B.R. (N.S.) 311 (Ont. S.C.).

[13] *Standard Finance Corporation* v. *Coopers & Lybrand*, [1984] 4 W.W.R. 543 (Man. Q.B.).

[14] *Re Ontario Equipment (1976) Ltd.* (1981), 33 O.R. (2d) 648 (Ont. S.C.), aff'd 35 O.R. (2d) 194 (Ont. C.A.); *Re Stark Coaxial Systems* (1985), 55 C.B.R. (N.S.) 308. Compare *In re Tulsa Port Warehouse Co., Inc.*, 29 U.C.C. Rep. 1608 (N.D. Okla. 1980).

2. Deemed Security Agreements

The Act applies to a number of other transactions that are not true security agreements (since they do not secure payment or performance of an obligation). There are four types of deemed security agreements:

(a) assignment of accounts
(b) transfer of chattel paper
(c) consignments
(d) leases for a term of more than one year.

These are brought within the scope of the Act by sections 2(nn) and 3(b). Unlike the Saskatchewan PPSA, the Ontario Act deems only assignments of book debts to be security interests, while the Manitoba Act deems only assignments of accounts and transfers of chattel paper to be security interests.[15]

(a) Assignment of accounts: The Act covers an assignment of a single account, as well as a general assignment of accounts. The definition of "account" in the Saskatchewan PPSA is broader than that contained in the Uniform Commercial Code, and unlike UCC 9- 106,[16] is sufficiently wide to encompass a participation arrangement between credit grantors under which there is a sale of rights arising under a loan transaction.[17] If the assignment is not in respect of a right to payment (e.g., assignment of patents, copyrights, trademarks or rights to performance), then the assignment is of an intangible rather than an account, and it will not be caught by the Act unless it was assigned as security.

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[15] Ont. PPSA, s.2; Man. PPSA, s.2.

[16] UCC 9-106 restricts "account" to a right to payment for goods sold or leased or for services rendered.

[17] See P.F. Coogan, H. Kripke and F. Weiss, "The Outer Fringes of Article 9: Subordination Agreements, Security Interests in Money and Deposits, Negative Pledge Clauses, and Participation Agreements" in chapter 23, and H. Kripke, "Suggestions for Clarifying Article 9: Intangibles, Proceeds, and Priorities" in chapter 24 of Coogan et al., *Secured Transactions under the Uniform Commercial Code* (1986).

(b) Transfer of chattel paper: The Act recognizes chattel paper (see definition in section 2(e)) as a distinct type of collateral. A typical example of a transfer of chattel paper is the purchase by a finance company of the retail instalment purchase agreements (formerly conditional sales agreements) of a retail seller. The priority rules contained in the PPSA give chattel paper a quasi-negotiable character (see sections 29, 31(5)), and apply whether the transfer is absolute as in the above example, or by way of security as in the case where a bank takes a security interest in the retail seller's chattel paper to secure a loan.

(c) Consignments: The conflicts, perfection and priority provisions of the Act (but not Part V) apply to the types of non- security consignments described in section 2(g). All non-security consignments not coming within this description are regulated by the common law or other legislation such as The Factors Act.[18]

A consignment to which the Act applies must be one in which both the consignor and the consignee are persons who in the ordinary course of their businesses deal in such goods. Accordingly, an isolated consignment of goods for sale by an auctioneer or other commercial consignee by a person who is not in the business of consigning goods is not governed by the Act.

Also excluded from the application of the Act are consignments between commercial consignors and consignees where the consignee is generally known in the area in which he carries on business to be selling or leasing goods of others. Since the legislative purpose underlying the inclusion of non-security consignments within the scope of the Act is to provide public disclosure of the existence of interests in goods in the possession of persons other than the holders of those interests, there is no need to require public disclosure of consignors' interests in goods in possession of consignees who are known to be selling or leasing goods belonging to other persons. The Act does not define what constitutes general knowledge of a consignee's business sufficient to exclude a transaction from the scope of the Act. It is clear, however, that knowledge or lack of knowledge of the existence of a particular consignment contract is not determinative. Section 2(g) refers to general knowledge concerning the consignee's relationship with his suppliers, not specific knowledge concerning a particular consignment arrangement. The general knowledge to which the section refers is knowledge on the part of persons who might be expected to deal with the consignee as creditors, buyers or lessees. These are the classes of people for whose benefit the public disclosure system of the Act was created.

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[18] R.S.S. 1978, c. F-1.

(d) Lease for a term of more than one year: Section 2(y) specifies the types of non-security leases that fall within the conflicts, perfection and priorities provisions of the Act. The definition of "lease for a term of more than one year" contained in this section has the effect of bringing within the Act leases which, depending upon events occurring after their execution, might or might not otherwise have been leases for a term of more than one year. Accordingly, a lease with a specified term of one year or less than one year is deemed to be a lease for a term of more than one year if it has the potential for becoming a lease extending beyond one year as a result of provisions in it under which the term is automatically renewable if not terminated by the parties or is renewable by the exercise of an option by one of the parties or by agreement of both parties. It is not significant that in a particular case the lease has not in fact become a lease for a term of more than one year. It is the potential term that is the focus of the section.

Section 2(y)(iii) brings within the definition a lease which initially did not have the potential, but ultimately ended up as being a lease with a term in excess of one year. It is not uncommon for a lessee to remain in possession of goods after the initial term of the lease is expired. In legal effect the initial lease is modified by agreement so as to extend the term. The important difference between a lease falling within clauses (i) or (ii), and a lease falling within clause (iii) is that, in the case of the former, the lease is a deemed security interest from the date it is executed, whereas in the case of the latter, the lease becomes a deemed security interest only at the date when the lessee's possession extends beyond the one year. Accordingly, where a lease has a term of one year or less and does not contain any provisions for renewal or extension, the registration and priority system of the Act does not apply to issues of priority arising out of any dealing with or seizure of the goods during the one year term of the lease. The common law and, in particular, the principle of *nemo dat quod non habet* determines the relative rights of the claimants. However, as soon as the lessee's possession continues beyond the one year period, the priority structure of the Act comes into play and the priority of the respective claims to the goods, including that of the lessor, are determined according to the priority system of the Act. In practical terms this means that if the lessor has perfected his interest by registration of a financing statement at any time prior to the date when the lessee's possession extends beyond one year, that interest will be given first priority, even as against an interest arising during the initial one year period of the lessee's possession. Failure on the part of the lessor to perfect his interest at or prior to the date when the Act comes into play renders the interest vulnerable to subordination under section 20, but only with respect to interests arising after the expiry of the initial one year term of the lease.

The Act does not apply to leases, whatever their duration, if the lessor is not regularly engaged in the business of leasing goods. See section 2(y)(iv). Accordingly, an isolated leasing transaction that would otherwise fall within the definition is excluded from the Act if the lessor is not in the business of leasing goods or only occasionally leases goods as part of carrying on its business.

The Lieutenant Governor in Council is empowered under sections 73(a) and 2(y)(v) to exclude from the application of the Act leases of types of goods which would otherwise fall within sections 2(y)(i)-(iv). These sections do not permit the exemption of specific leases; they apply only to leases of categories of goods. The policy of the Act will be served only if the exempting power is exercised with respect to categories of goods the possession of which is generally known by the public to be acquired under leases. At the date of publication of this handbook, the power of exclusion given by section 73(a) and 2(y)(v) has been exercised only with respect to leases of telephones, telephone switchboards, telephone switchboard consoles, telephone jacks, telephone plugs and telephone wiring.[19]

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[19] See The Personal Property Regulations, R.R.S. P-6.1, Reg. 1, s.50.

3. Unconventional Security Devices

The PPSA is broad in scope. It will apply whenever a transaction gives a party an interest in collateral in order to secure payment or performance of an obligation. This will not only encompass the security devices used by institutional financers, but it may also encompass unconventional forms of security interests. There are several instances where this may arise. First there are informal arrangements between debtors and non-institutional creditors. An eminent American commentator has argued strongly that the sweeping language of Article 9 of the Code should not bring "this whole Pandora's box of informal agreements between debtors and creditors within the Code".[20] However, Canadian courts have not developed the equitable lien in such informal dealings to the extent that the American courts have, and a much better case can be made for the application of the Act to them.[21]

There are several other arrangements that give the creditor a right against the debtor, but which should not be regarded as creating a security interest. The definition of security interest requires that there be an interest in the collateral. This suggests that the creditor must obtain a real right in the property: i.e., a right exercisable not only against the debtor, but against third parties as well. A mere contractual license to seize and sell the debtor's property does not create an interest in the property enforceable against strangers and therefore should not be regarded as a security agreement.

The following types of transactions fall on the periphery of the PPSA. Whether or not they fall within the scope of the Act will often depend upon the specific wording used.

(a) Negative covenants: A negative covenant (often referred to as a negative pledge clause in the United States) involves a promise by the covenantor not to encumber all or some of his assets until an indebtedness is paid. A negative covenant standing alone should not be held to create a security interest because it does not create an interest in collateral enforceable against third parties.[22] The remedy for breach of this covenant is an action against the promisor for breach of contract.

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[20] G. Gilmore, *Security Interests in Personal Property* (1965), Vol. 1, at 336.

[21] See *Guntel* v. *Kocian*, [1985] 6 W.W.R. 458 (Man. Q.B.) in which an informal security agreement was found to be within the scope of the Manitoba Act.

(b) Safekeeping and deposit arrangements: The debtor may give the creditor possession of certain items of personal property. This is not conclusive evidence that a security interest was intended. The deposit may have been merely for safekeeping, or it may have been intended merely as a mechanism to prevent the debtor from transferring his interest to another[23] (particularly in the case of securities that require production of the documents in order for the transfer to be effectual). The creditor does not obtain an interest in the collateral in such transactions; therefore a security interest is not created.

(c) Subordination agreement: Under a subordination agreement a party (the junior creditor) may agree to postpone his rights against the debtor until the claim of the other party (the senior creditor) is satisfied. It has been argued that a subordination agreement creates a security interest since the junior creditor surrenders rights in order to secure the payment of an obligation by the common debtor. If there is a transfer of an interest from the junior creditor to the senior creditor (so that the senior creditor obtains a right enforceable not only against the junior creditor, but also against third parties) the transaction may well constitute a security agreement. If the subordination agreement merely involves a waiver or postponement of the security interest by the junior creditor rather than a transfer of an interest to the senior creditor, then the subordination agreement should not be taken to be a security agreement. Most of the subordination agreements currently in use appear to involve merely a contractual waiver or postponement by the junior creditor. The issue is significant because a subordination agreement that involves only a contractual waiver will not be sufficient to give the senior creditor priority if the junior creditor goes into bankruptcy.[24] The senior creditor will be entitled to assert its claim in priority to the junior creditor's trustee in bankruptcy only if the subordination in substance creates a security interest and it is perfected under the PPSA. The financing statement must name the junior creditor as debtor in order to perfect the security interest by registration; registration of a financing change statement under section 47 is not sufficient.

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[22] *Frado* v. *Bank of Montreal* (1984), 34 Alta. L.R. (2d) 293 (Alta. Q.B.); *Swiss Bank Corp. Ltd.* v. *Lloyds Bank Ltd.*, [1981] 2 All E.R. 449 (H.L.). And see Coogan, Kripke and Weiss, *supra*, footnote 17, at para. 23.10.

[23] *Royal Bank of Canada* v. *Mesa Estates Ltd.*, [1986] 2 W.W.R. 641 (B.C.C.A.).

[24] See Coogan, Kripke and Weiss, *supra*, footnote 17, at 23.02-.08. And see, M.D. Heilson and M.W. Hirsh, "Private Subordination Agreements and the U.C.C.: Is Section 1-209 an "Un- Wyse" solution?" (1983), 38 *Bus. Law* 555.

(d) Set-off: Set-off is a procedural right that permits a person against whom a claim is made to set up a countervailing claim in reduction of his liability. A contractual right of set-off is also possible. In most cases a set-off will not be within the Act because it comes into existence not by consensual agreement but by operation of law.[25] A contractual set-off is likely not a security agreement because although it is created consensually, the party asserting it acquires a purely personal right to set one obligation against the other: he does not acquire an interest in the other party's monetary claim.[26]

(e) Contractual right of distress: The right of distress given to a landlord does not come into existence consensually but by operation of law. Therefore the right of distress will not be within the Act. The landlord may, however, provide a contractual right of distress that will enable him to seize and sell the tenant's goods in cases where the statutory right of distress is not available. Likely this will not be taken to create a security interest as it creates merely a licence to enter and seize the tenant's property, and does not grant an interest in such goods enforceable against a third party.[27] Thus, a third party who had acquired an interest in the goods would have priority over a contractual right of distress. If the lease provides that the contractual right of distress is effective against third parties, then it must be regarded as a security interest.

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[25] See Gilmore, *supra*, footnote 20, Vol. 1, at 315-16.

[26] R.M. Goode, *Legal Problems of Credit and Security* (1982), at 113.

[27] *First National Bank* v. *Cudmore* (1917), 10 Sask. L.R. 201, 34 D.L.R. 201 (S.C. en banc.). But note that a right of distress arising by operation of law is created by an attornment clause in a real property mortgage by virtue of s.134 of The Land Titles Act, R.S.S. 1978, c. L-5.

(f) Subrogation: A guarantor who has discharged the debtor's obligation is subrogated to the rights of a secured creditor, and may exercise the rights and remedies against the collateral secured by the security agreement.[28] Subrogation rights should not be considered within the Act because they do not come into existence by agreement but by operation of law.

4. Security Agreements and Trusts

Judicial recognition has been given to the use of a trust as a method of securing debt. The Ontario Court of Appeal in *Re Berman*[29] considered a transaction whereby Astra Trust Company loaned $5,500 to Dr. Berman, the proceeds of which were invested in a mortgage retirement savings plan with Astra. Dr. Berman executed a letter of direction which authorized Astra, the trustee of the plan, to first apply the proceeds of any redemption of the plan against the indebtedness of Dr. Berman.

The Court did not consider the effect of the letter of direction. It held that under the law of trusts, Astra had a charge on the interest of the beneficiary in the trust estate. Accordingly, it did not need to decide whether the letter of direction created a security interest.

The decision is capable of producing great chaos if extended beyond the narrow confines within which it was given. It should not be taken to insulate a trust arrangement intended as security from the application of the Act. For example, the equipment trust and trust receipt were institutional devices that were based upon the trust, but which are clearly within the scope of the PPSA. Furthermore, trust proceeds clauses in security agreements should also be regarded as within the scope of the Act since they are consensually created and intended simply to extend the security interest to the proceeds of disposition of the collateral secured. If the trust were held to insulate such transactions from the PPSA, the policy of the Act would be greatly undermined and legislative amendment would be required.

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[28] *Routley* v. *Gorman* (1920), 55 D.L.R. 58 (Ont. App. Div.).

[29] (1979), 105 D.L.R. (3d) 380 (Ont. C.A.).

In other cases a pure trust arrangement is clearly constituted. The mortgage retirement savings plan in *Re Berman* was unquestionably a true trust, and not a security device. If *Re Berman* is correct and the law of trusts supplies a security-like feature in favour of the trustee, then the PPSA will not apply. It should, however, be noted that the British Columbia Court of Appeal rejected the notion that the law of trusts provides a charge on the trust estate. [30] It held that such a right must depend upon an agreement (such as the letter of direction in the Astra case). If the charge does not arise by operation of law, but only by virtue of the letter of direction, then the letter of direction must be regarded as a security agreement because it is it that creates a charge on the trust estate. However, it could still be argued that the letter of direction merely constituted a contractual right of set-off and did not create a security interest in the fund enforceable against third parties.[31]

It has also been held that a constructive trust is not within the scope of personal property security legislation.[32] This is undoubtedly so, as the constructive trust is created by operation of law rather than by consensual agreement between the parties.

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[30] *MacMahon* v. *Canada Permanent Trust*, [1980] 2 W.W.R. 438 (B.C.C.A.).

[31] See also J.S. Ziegel, "The Quickening Pace of Jurisprudence Under the Ontario Personal Property Security Act" (1979), 4 *Can. Bus. L.J.* 54, at 73-74.

[32] *Kimwood Enterprises Ltd.* v. *Roynat Inc.*, [1985] 3 W.W.R. 67 (Man. C.A.).

NON-APPLICATION OF ACT

4. **Except as specifically otherwise provided, this Act does not apply to:**

   (a) a lien, charge or other interest given by statute or a lien given by rule of law for the furnishing of goods, services or materials;

   (b) an assignment of an interest or claim in or under any contract of annuity or policy of insurance, except insofar as the money payable under a policy of insurance is or would be indemnity or compensation for loss of or damage to collateral, or any right to any such moneys payable;

   (c) an assignment of present or future wages, salary, pay, commission or any other compensation for labour or personal services;

   (d) an assignment of a right to payment under a contract to an assignee who is to perform the assignor's obligations under the contract;

   (e) the creation or assignment of an interest in or a lien on real property, including chattels real;

   (f) the assignment of any right to payment that arises in connection with an interest in or a lease on real property other than:

      (i) an assignment of rental payments payable under a lease of real property; or

      (ii) a right to payment evidenced by a security;

   (g) a sale of accounts or chattel paper as part of a sale of the business out of which they arose, unless the vendor remains in apparent control of the business after the sale;

   (h) an assignment of accounts made solely to facilitate the collection of accounts for the assignor;

   (i) an assignment of a claim for damages or a judgment representing a right to damages;

(j) an assignment for the general benefit of creditors made pursuant to an Act of the Parliament of Canada relating to insolvency.

Definitional Cross References:

"account" - s.2(b)
"chattel paper" - s.2(e)
"collateral" - s.2(f)
"creditor" - s.2(j)
"goods" - s.2(s)
"money" - s.2(z)
"security" - s.2(11)

1. Liens for Work or Materials
2. Assignment of Insurance Claims
3. Wage Assignments
4. Assignment of Right to Payment where Assignee Performs Assignor's Obligation
5. Assignment of Interest in Real Property
6. Assignment of Right to Payment Connected to Lease or Real Property Interest
7. Assignment of Accounts or Chattel Paper as Part of Sale of Business
8. Miscellaneous Assignments
9. Goods Shipped under Reservation
10. Bank Act Security Agreements

1. Liens for Work or Materials

Section 4(a) excludes liens, charges and other interests created by statute or rule of law for the furnishing of goods, services or materials. For example, the statutory lien granted by virtue of The Threshers' Lien Act[1] is not within the scope of the Act: the lien would not need to be registered under the Act, nor would the seizure and sale of the grain under the lien be governed by Part V of the PPSA. The exclusion of such liens was not strictly necessary because they do not fall within the definition of a "security agreement": the interest in collateral does not arise out of an agreement between the parties, but arises out of operation of law.

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[1] R.S.S. 1978, c.T-13.

Although liens created by operation of law are not generally within the scope of the Act, the Act does provide a rule that grants priority to certain lien-claimants over the claims of secured creditors. See section 32.

2. Assignment of Insurance Claims

Section 4(b) excludes assignments of interests in insurance policies except to the extent that the interest involves a right to payment under a policy of insurance providing indemnity or compensation for loss or damage to collateral. Priority disputes involving insurance interests are governed by The Saskatchewan Insurance Act.[2] If the assignment of the right to payment is in respect of the loss of or damage to collateral, then the insurance payments will be regarded as "proceeds" of the collateral (see section 2(ee)) and will fall within the scope of the Act (see section 28).

The Saskatchewan Court of Appeal in *Re Perepeluk*[3] held that an assignment of insurance proceeds in respect of crops covered by section 178 Bank Act security were not within the scope of the PPSA. The majority opinion was that the assignment was absolute and not by way of security. Although the result is very likely correct, the reason given is problematic. If indeed the assignment was absolute, it would follow that the bank was entitled to the insurance money whether or not the indebtedness had been repaid by the debtor. It is suggested that the better view would be to recognize that the assignment was by way of security, but find that the assignment is not within the scope of the Act because section 4(b) brings within the scope of the Act only insurance proceeds payable as compensation for loss or damage to collateral subject to provincial security interests.[4]

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[2] R.S.S. 1978, c.S-26, s.162.

[3] [1986] 2 W.W.R. 630, 47 Sask. R. 81.

[4] The reasoning in *Re Perepeluk* was followed in *Canadian Imperial Bank of Commerce v. Szczecinski* , [1987] 2 W.W.R. 286 (Q.B.) in which the assignment of crop insurance was in connection with a mortgage of land. Again a better explanation of the result is not that the assignment was absolute, but that the assignment was excluded by section 4(b). Only assignments of insurance proceeds in respect of collateral are within the scope of the PPSA, and "collateral" is defined as personal property subject to a security interest. Here the insurance was taken upon the growing crops as part of the realty rather than as personal property.

3. Wage Assignments

Section 4(c) excludes wage assignments from the Act. Assignments of wages and other compensation for personal services made to secure payment of an obligation other than assignments of wages to a credit union, and assignments to a supplier of tools, equipment or supplies are invalidated by The Assignment of Wages Act.[5] Such assignments will not be governed by the PPSA. A priority dispute involving a wage assignment will be determined on the basis of the law governing choses in action other than that contained in the PPSA.

4. Assignment of Right to Payment where Assignee Performs Assignor's Obligation

Section 4(d) excludes an assignment of a right to payment if the assignor assumes the assignor's performance obligation. Because the assignee earns the right to payment through performance of a contract, there is little possibility that a third party would be deceived into thinking that the assignor has rights under the contract to assign.

5. Assignment of Interest in Real Property

Section 4(e) excludes the creation and assignment of an interest in real property and chattels real. At common law, the mortgage debt was regarded as personalty rather than realty. Leases of land were also classified as personalty. Section 4(e) ensures that the creation and assignment of such interests are not within the scope of the Act. The creation and transfer of such interests is to be governed by the provisions of The Land Titles Act.[6]

6. Assignment of Right to Payment Connected to Lease or Real Property Interest

Section 4(f) excludes an assignment of a right to payment that is connected with a real property interest or a lease of land other than an assignment of rents or a right to payment evidenced by a security. A dispute may arise where the right to payment under a real property mortgage is assigned. The Ontario Court of Appeal in *Re Urman*[7] held that a mortgage debt is not to be separated from the land in which it is secured for the purpose of determining priority between competing assignees. Such an assignment is to be treated as an interest in land. The Saskatchewan Act gives legislative sanction to the view that assignments of mortgages ought to be governed by real property law. There are, however, two exceptions to this rule:

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[5] R.S.S. 1978, c.A-30, ss.3 and 6.

[6] R.S.S. 1978, c.L-5, ss.118, 125 and 142-45.

> (a) Assignment of rents: It is common practice for mortgagees of rental properties to take an assignment of rents from the mortgagor as additional security to a real property mortgage.[8] The priority rules governing such an assignment were far from clear prior to the enactment of the PPSA. A distinction was traditionally drawn between rent accrued due, which was a mere chose in action, and rent accruing due (future rent), which was a real property interest in the form of an incorporeal hereditament.[9] If the landlord conveyed his interest in the reversion, the future rents would pass as well since they were incidental to the reversion. The landlord could, however, sever the future rents from the reversion by transferring the rents to another. The transfer of future rents created an interest in realty in the form of a rent charge,[10] which carried with it a right of distress that permitted the transferee to enter the land and impound such chattels found on it.[11] In principle, a priority dispute would be determined by a first in time priority rule. An assignee of future rents obtained a legal interest in real property, and would not be defeated by a subsequent assignment of the rents, whether alone, or passing with a conveyance of the reversion.[12]

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7. (1983), 44 O.R. (2d) 248 (Ont. C.A.).

8. See also R.C.R. Price and M.J. Trussler, *Mortgage Actions in Alberta* (1985), at 322-324.

9. *Brown* v. *Gallagher & Co.* (1914), 19 D.L.R. 682 (Ont. S.C.).

10. E.H. Burn, *Cheshire's Modern Law of Real Property* (11th ed. 1972), at 609; *Hopkins* v. *Hopkins* (1882) 3 O.R. 223 in which such a rent charge was held to be registerable in the land registry system.

11. At common law an assignment of rents did not carry with it a right of distress, but this was altered by statute: see 4 Geo. 2, c.28, now The Landlord and Tenant Act, R.S.S. 1978, c.L-6, s.19. And see *In Re Edmonton Stationers Ltd.*, [1919] 3 W.W.R. 406 (Alta. App. Div.).

12. See 36 C.J. 368; 49 Am. Jur. 2d, para. 528 citing American cases to this effect.

There has been an increasing tendency in recent years to treat future rent as a chose in action rather than a real property estate.[13] Consequently, a priority dispute has been resolved by applying the rule in *Dearle* v. *Hall* which governs competitions between equitable assignments of choses in action.[14]

The PPSA appears to adopt the view that both accrued and future rent are to be considered a chose in action. Regardless whether an assignment of future rent is characterized as personalty or realty, the unmistakable conclusion obtained from reading sections 4(e) and 4(f) and section 22 together is that the Act was intended to apply to assignments of rents. It provides a complete set of priority rules applicable to disputes involving interests in rental payments.[15] The registration of a caveat in the land titles system in respect of the assignment of rents should not affect the operation of these rules, since section 69(3) provides that the provisions of the PPSA are to prevail in case of a conflict with another statute.[16]

(b) Right to payment evidenced by a security: A "security" encompasses such things as bonds, debentures and other debt obligations given by a corporation. See section 2(11). The corporation's payment obligation under a debt obligation may be secured by a mortgage of its real property. The holder of the debt obligation may grant to a secured party a security interest in the obligation (the "security"). This transaction is brought within the scope of the PPSA by virtue of the exception in section 4(f). The secured party should therefore perfect its security interest in the security by registration or possession in accordance with the provisions of the PPSA.

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[13] See *Mutual Life Assurance Company of Canada* v. *Boban Construction Ltd.* (1984), 55 B.C.L.R. 112 (B.C.S.C.). *And see Canada Trustco Mortgage Company* v. *Skoretz*, [1983] 4 W.W.R. 618 (Alta. Q.B.) in which Miller J. held that an assignment of future rent does not give the assignee an interest in land because he has no right to recover the property, nor any right to distrain. But note that in Saskatchewan, unlike Alberta, an assignee of rents is given a right of distress. And see the comments of Halvorsen, J. in *United Dominion Investments Ltd.* v. *Morguard Trust Co.* (1985), 38 Sask. R. 229 (Q.B.), rev'd 43 Sask. R. 81 (C.A.).

[14] See *Mutual Life Assurance Company of Canada* v. *Boban Construction Ltd.*, *ibid* The rule in *Dearle* v. *Hall* (1823), 3 Russ. 1, [1824-1834] All E.R. Rep. 28, 38 E.R. 475 awarded priority to the assignee who was first to give the debtor notice of the assignment.

[15] PPSA, ss.20(1), 22, 34 and 35.

[16] This view is consistent with the result in *United Dominion Investments Limited* v. *Morguard Trust Company*, [1986] 1 W.W.R. 78, 43 Sask. R. 81 (C.A.). The fact that a caveat was registered in the land titles system in respect of the assignment of rents should not affect the priority scheme set out in the PPSA.

7. Assignments of Accounts or Chattel Paper as Part of Sale of Business

Section 4(g) excludes the assignment of accounts or chattel paper as part of a sale of a business. It is unlikely that third parties would be led to believe that the vendor remains the owner of the accounts or chattel paper if he no longer controls the management of the business. Accordingly, there was no need to bring such transactions within the scope of the Act.

8. Miscellaneous Assignments

Section 4(h) excludes assignments of accounts made solely to facilitate collection. Section 4(i) excludes assignments of a claim for damages or a judgment for damages. Section 4(j) excludes assignments for the general benefit of creditors made under federal insolvency proceedings. These types of assignments rarely give rise to the problems that the PPSA was designed to address.

9. Goods Shipped under Reservation

The definition of "security interest" in section 2(nn) excludes an additional type of transaction. The interest of a seller who ships goods to a buyer under a negotiable bill of lading to his own order or to the order of his agent does not create a security interest unless there is some additional indication that a more structured secured financing arrangement was intended. This practice is given express recognition in The Sale of Goods Act: the seller is said to have reserved the right of disposal.[17] This permits the seller to immediately resell the goods on the market.[18] If the seller's interest were characterized as a security interest, the seller would not be entitled to resell on the market, but would be forced to invoke the more elaborate system under Part V of the Act. This was thought to be commercially unworkable. Consequently, the transaction was excluded from the application of the Act.

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[17] R.S.S. 1978, c. S-1, s.21.

[18] *Ibid.*, s.47(4).

10. Bank Act Security Agreements

The Ontario Court of Appeal in *Rogerson Lumber Co. Ltd.* v. *Four Seasons Chalet Ltd.*[19] took the position that the section 178 Bank Act security agreement does not create a security interest within the meaning of the Ontario PPSA. It is clear that a section 178 interest does not require registration under the PPSA. The nature and incidents of the security interest will be governed by the provisions of the Bank Act. A more difficult question arises when a bank registers in the PPSA registry a financing statement covering its section 178 security interest, or where a bank takes both a provincial security interest and a Bank Act security interest on the same collateral to secure the same obligation. Some commentators have suggested that in such cases the bank may elect which system of law is to apply.[20] However, a strong argument may be made that registration of the section 178 security device in the provincial registry has no legal effect. Furthermore, if a bank takes both federal and provincial security interests on the same collateral to secure the same obligation, it must be determined which security agreement is the primary security agreement and which is the subsidiary security agreement, with the result that most questions relating to priority will be determined by the primary agreement.[21]

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[19] (1980), 113 D.L.R. (3d) 671 (Ont. C.A.).

[20] See R.H. McLaren, *Secured Transactions in Personal Property in Canada* (1979), at para, 6.03 [1][b][i][B]. But see *contra*, *Royal Bank* v. *Kreiser* (1986), 34 B.L.R. 73 (Sask. Q.B.).

[21] See R.C.C. Cuming and R.J. Wood, "Compatibility of Federal and Provincial Personal Property Security Law" (1986), 65 *Can. Bar Rev.* 267.

CONFLICT OF LAWS: GOODS, POSSESSORY SECURITY INTEREST IN DOCUMENTARY COLLATERAL

5.-(1) Except where otherwise provided in this Act, the validity, perfection and effect of perfection or non-perfection of:

(a) a security interest in goods; and

(b) a possessory security interest in securities, instruments, negotiable documents of title, money and chattel paper;

is determined by the law of the jurisdiction where the collateral is situated when the security interest attaches.

(2) A security interest in goods perfected, under the law of the jurisdiction in which the goods are situated when the security interest attaches, before the goods are brought into the province, continues perfected in the province:

(a) as against a buyer in good faith who acquires an interest in the goods after they are brought into the province, if the security interest is perfected in the province prior to the acquisition; and

(b) as against all other persons, if the security interest is perfected in the province:

(i) within 60 days after the day the goods are brought into the province;

(ii) within 15 days after the day the secured party receives notice that the goods have been brought into the province; or

(iii)prior to the day that perfection ceases under the law of the jurisdiction in which the goods were situated when the security interest attached;

whichever is earliest.

(3) A security interest that is not perfected as provided in subsection (2) may be otherwise perfected under this Act.

(4) Where a security interest mentioned in subsection (1) is not perfected under the law of the jurisdiction in which the collateral was situated when the security interest attached before being brought into the province, it may be perfected under this Act.

Definitional Cross References:

"chattel paper" - s.2(e)
"collateral" - s.2(f)
"document of title" - s.2(m)
"goods" - s.2(s)
"instrument" - s.2(u)
"money" - s.2(z)
"notice" - s.67(3)
"person" - s.2(cc)
"secured party" - s.2(kk)
"security" - s.2(11)
"security interest" - s.2(nn)

1. Scope
2. Security Interest in Goods: The Residual Choice of Law Rule
3. Possessory Security Interests in Non-Goods Collateral

1. Scope

Sections 5 to 8 provide an extensive, although not exhaustive, set of choice of law and perfection rules applicable to security interests. Three features of these rules should be noted. The first is their scope. These sections specify choice of law rules for validity and perfection of security interests and for procedural and substantive issues arising out of enforcement of security interests.[1] Accordingly, they are far more encompassing than anything contained in personal property security legislation replaced by the Act. Prior legislation did not purport to prescribe choice of law rules. Generally, it merely required "perfection" of security interests governed by foreign law when the collateral involved was brought into the province.

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[1] Article 9 of the Uniform Commercial Code was amended in 1972 to delete any reference to choice of law rules relating to validity. The reformulated sections now address perfection only. The law governing questions of validity is determined by reference to the common law.

The second feature of these rules is that while some of them reflect common law conflict of laws principles, others do not. An assumption underlying this latter category of rules is that other jurisdictions have enacted similar rules. This assumption does not reflect reality at this time. The result is that the intention of the Legislature to modernize and rationalize conflict of laws rules of personal property security transaction may not be fully realized. It may also mean that a secured party will be forced with having to contend with two or more sets of choice of law rules.

A third feature of the rules contained in these sections is that the parties to a security agreement have only limited freedom to choose the applicable law. Very little scope for party autonomy is permitted with respect to those rules that protect third party rights. There is greater scope for choice of law with respect to *inter partes* matters. To the extent permitted by the common law concept of proper law of the contract, the parties to a security agreement can select the law applicable to substantive issues involved in the enforcement of rights of the secured party against the collateral. See section 8(4)(c).

Sections 5, 6 and 7 each specify choice of law rules to deal with the validity, perfection and effect of perfection or non- perfection of security interests. The term "validity" as used in these sections is not defined in the Act. It must at least refer to the legal question as to whether or not a security interest has been created. However, it is not the validity of the security agreement as a contract that is addressed by the sections. The choice of law rule associated with the issue of validity is the statutory parallel of the common law rule for choosing the law under which the efficacy of a title retention provision in a conditional sales contract or title transfer under a chattel mortgage is to be determined.[2]

The term "perfection", while not defined, is a term of art under the Act. In sections 5, 6 and 7, it means the priority status acquired when attachment of a security interest has occurred and the other steps for "perfection" (generally registration of a financing statement) have been taken. A difficulty may be encountered when the issue arises as to whether or not a security interest taken in another jurisdiction which does not have a personal property security act is "perfected". A security interest can be found to be perfected even though under the applicable law no public notice measures such as filing or registration are prescribed.[3]

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[2] See J.-G. Castel, *Canadian Conflict of Laws* (1985), at 414-423.

The "effect of perfection or non-perfection" refers to the priority structure of the applicable law. Under the Act the priority structure is in some cases accepted in total, but in others it is modified to the extent that domestic interests are affected.

2. Security Interest in Goods: The Residual Choice of Law Rule

Section 5 states a choice of law rule for security interests in goods not falling within sections 6 or 7. The choice of law rule specified is the traditional *lex situs* rule of the common law.[4] Section 5(4) states an exception to the basic rule of section 5(1). While under section 5(1) the issue of initial perfection is to be determined by the *lex situs* at the date of attachment of the security interest, section 5(4) recognizes that a security interest which attaches while the goods are in a foreign jurisdiction but not perfected under the laws of that jurisdiction can be perfected in Saskatchewan if the goods are brought into Saskatchewan. Section 5(4) must be treated as having significance only so long as issues associated with the security interest are litigated in Saskatchewan or another province having a similar provision in its legislation.[5]

In general approach, section 5(2) follows the pattern of pre-PPSA registration legislation which required foreign security interests to be perfected under the registry system of the province if those interests were to have priority over certain interests in the goods acquired in the province. However, the section provides refinements not found in prior legislation.

Section 5(2)(b) provides for a "grace period", or more accurately, a period of temporary perfection without registration or possession by the secured party. The temporary perfection in the province is dependent on perfection of the security interest under the law governing its validity. The temporary perfection is granted in the province only to a security interest perfected at the time the goods come into the province under the governing law. Further, temporary perfection in the province ceases when perfection under the foreign law ceases unless the security interest has been "otherwise perfected under this Act". See sections 5(2)(b)(iii) and 5(3).

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[3] See section 7(4).

[4] Castel, *supra*, footnote 2, at 414-18.

[5] See *In re Moore*, 7 U.C.C. Rep. 578 (D. Me. Bankr. 1969) in which the court held that the law of the jurisdiction into which the goods were brought governed priorities.

The temporary perfection granted by section 5(2) is conditional upon ultimate perfection by other means in accordance with the Act.[6] Accordingly, if the foreign security interest is never otherwise perfected in the province, it is not deemed perfected during the period of temporary perfection specified in section 5(2)(b). Notice to the secured party shortens the 60-day period of temporary perfection otherwise allowed by section 5(2)(b)(i). Section 5(2)(b)(ii) provides that the security interest must be perfected in the province within 15 days of such notice. See section 67(3) as to what constitutes notice under the Act.

Section 5(2)(a) provides a very different rule with respect to temporary perfection where a "buyer in good faith" acquires in Saskatchewan an interest in goods subject to a foreign security interest. The effect of the section is to withhold temporary perfection for foreign security interests in such cases. As a result, foreign security interests must be perfected in the province, as permitted by section 5(3), in order for it to have priority over the interests of a buyer in good faith. The policy underlying section 5(2)(a) is that a potential good faith buyer of goods that are in the possession of the debtor should be able to rely on the registry as an accurate record of the security interests to which he will be subject if he buys the goods. He need not be concerned about periods of temporary perfection during which a search result will not disclose existing perfected security interests. No similar provision is contained in the Manitoba or Ontario Personal Property Security Acts.

The protection of section 5(2)(a) is available only to "good faith buyers". The term is not defined in the Act. Whether mere knowledge of the existence of a security interest in the goods prevents a buyer from being in good faith remains an open question.[7] There is no requirement that the buyer be a consumer or that the goods be acquired in the ordinary course of business.

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[6] *Royal Bank of Canada* v. *Deloitte, Haskins & Sells Limited*, [1987] 1 W.W.R. 140, 50 Sask. R. 297 (Sask. Q.B.).

Purchasers, as defined in sections 2(hh) and 2(ff), other than buyers fall within section 5(2)(b). If, for example, a motor vehicle subject to a foreign security interest is brought into Saskatchewan and sold to a good faith buyer before the security interest is perfected by registration in this province, the good faith buyer takes free from the foreign security interest. If, however, after bringing the vehicle into the province the debtor gives a security interest in it, the foreign security interest has priority if the Saskatchewan security interest is taken during the period of temporary perfection provided by section 5(2)(b) and if the foreign security interest is perfected before the expiry of this period. But, if a good faith buyer gives a security interest in the vehicle in Saskatchewan, the Saskatchewan security interest will have priority over the foreign security interest. This is because the Saskatchewan security interest is taken in the good faith buyer's interest, which under section 5(2)(a) is not subject to the foreign security interest.

3. Possessory Security Interests in Non-Goods Collateral

Section 5(1) states a *lex situs* test for determining the applicable law for questions of the validity, perfection and effect of perfection or non-perfection of possessory security interests in securities, instruments, negotiable documents of title, money and chattel paper. While the term "possessory security interest" is not defined, it undoubtedly refers to security interests in the enumerated collateral perfected by the secured party taking possession of it. This is in line with the established common law choice of law rules applicable to pledges and assignments of negotiable instruments and securities.[8]

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[7] See *Lanston Monotype Machine Company* v. *Northern Publishing Company*, [1922] 2 W.W.R. 529 (S.C.C.). This question arises in a much broader context. Read together, sections 64(1) and 35(1) suggest that a secured party with a registered financing statement has priority over the holder of a prior security interest which is not perfected or which is later perfected even though he has notice of the earlier security interest when he takes his security interest. Given the background and origins of the Act, it is most unlikely that section 64(1) was intended by the Legislature to equate notice alone with bad faith.

[8] Castel, *supra* footnote 2, at 420-421.

Where non-possessory security interests in securities, instruments, negotiable documents of title, money and chattel paper are involved, the validity, perfection and effect of perfection or non-perfection are determined by the law of the jurisdiction where the debtor is located when the security interest attaches. See section 7(1). Consequently, it is possible to have two valid security interests in the same collateral, each of which is governed as to validity, perfection and effect of perfection or non-perfection by a different body of law. In such a situation, section 8 may well apply.

CONFLICT OF LAWS: GOODS TO BE REMOVED FROM JURISDICTION

6.- (1) Subject to section 7, if the parties to a security agreement creating a security interest in goods in one jurisdiction understand at the time the security interest attaches that the goods will be kept in another jurisdiction, and the goods are removed to the other jurisdiction within 30 days after the security interest attached for purposes other than transportation through the other jurisdiction, the validity, perfection and effect of perfection or non-perfection of the security interest are determined by the law of the other jurisdiction.

(2) Where the jurisdiction to which the goods are removed is other than this province and the goods are later brought into this province, the security interest in the goods is deemed to be one to which subsection 5(2) applies if it had been perfected under the law of the jurisdiction to which the goods were removed.

Definitional Cross References:

"goods" - s. 2(s)
"security agreement" - s.2(mm)
"security interest" - s.2(nn)

Section 6 recognizes the artificiality of a choice of law rule based on the *lex situs* of goods at the date of attachment of a security interest in cases where it is understood by the parties that the goods are to be taken almost immediately to another jurisdiction. The effect of section 6 is to prescribe the law of the jurisdiction to which the goods have been taken in fulfillment of the parties' expectations as the law governing the validity, perfection and effect of perfection or non-perfection of the security interest.

This section will have important practical significance principally with respect to secured instalment credit purchases of goods in border cities and towns where the buyer, after buying on one side of the border, takes the goods to his home or business on the other side of the border. Under section 6, the law of the "ultimate intended destination of the goods governs *ab initio* and not just from the time that the goods are actually in the destination jurisdiction.

In order for the section to apply, it is necessary that the parties "understand" at the time of attachment (usually the date of execution of a secured instalment sales contract) that the goods will be kept in the other jurisdiction. Presumably this "understanding" need not be recorded as a term of the security agreement, nor need it be the subject matter of any discussion between the parties. If a seller knows that his buyer lives in another province and that he has come into the province to purchase the goods and return home with them, the requisite understanding would be present.

As a practical matter, a credit granter who carries on business in a border community would be wise to register his security interest in both adjoining jurisdictions. If the debtor brings the collateral back into the jurisdiction where the security interest was created and sells it or gives a security interest in it, section 5(2) will apply and perfection in this jurisdiction would be required.

If goods are purchased in Saskatchewan under a secured instalment sales contract and pursuant to the understanding of the parties are then taken and kept in Jurisdiction A within the 30 days from the date of the agreement, but are then taken by the debtor to Jurisdiction B, it will be the law of Jurisdiction A and not of Jurisdiction B that governs the validity, perfection and effect of perfection of the security interest. Accordingly, perfection of the security interest in Jurisdiction B would be neither necessary nor sufficient for the purposes of section 5(2); perfection in Jurisdiction A would be required. See section 6(2).

CONFLICT OF LAWS: MOBILE GOODS, INTANGIBLES, NON-POSSESSORY SECURITY INTEREST IN DOCUMENTARY COLLATERAL

7.- (1) The validity, perfection and effect of perfection or non-perfection of:

(a) a security interest in intangibles or in goods which are of a type that are normally used in more than one jurisdiction, if such goods are classified as equipment or as inventory leased or held for lease by a debtor to others; and

(b) a non-possessory security interest in securities, instruments, negotiable documents of title, money and chattel paper;

are governed by the law of the jurisdiction where the debtor is located when the security interest attaches.

(2) For the purposes of this section, a debtor is deemed to be located at his place of business if he has one, at his chief executive office if he has more than one place of business, and otherwise at his place of residence.

(3) When a debtor changes his location to another jurisdiction, a perfected security interest mentioned in subsection (1) continues perfected in this jurisdiction if it is perfected in the new jurisdiction:

(a) within 60 days after the day the debtor changes his location;

(b) within 15 days after the day the secured party receives notice that the debtor has changed his location; or

(c) prior to the day that perfection ceases under the law of the first jurisdiction;

whichever is earliest.

(4) If the jurisdiction in which the debtor is deemed to be located under this section does not provide for public registration or recording of security interests mentioned in subsection (1) and the collateral is not in the posses-

sion of the secured party, any security interest in the collateral which is not perfected under this Act is deemed to be an unperfected security interest in relation to any interests in the collateral acquired by a person in this province.

(5) A security interest that is not perfected as provided in subsection (3) or is deemed to be unperfected in this province under subsection (4) may be otherwise perfected under this Act.

(6) Notwithstanding section 6 and subsection (1) of this section, the validity, perfection and effect of perfection or non-perfection of a security interest which is created by a debtor who has an interest in minerals or the like, including oil and gas, before extraction and which attaches thereto upon extraction, or attaches to an account resulting from the sale thereof at the wellhead or minehead, is governed by the law of the jurisdiction in which the wellhead or minehead is located.

Definitional Cross References:

"account" - s.2(b)
"chattel paper" - s.2(e)
"collateral" - s.2(f)
"debtor" - s.2(k)
"document of title" - s.2(m)
"equipment" - s.2(n)
"goods" - s.2(s)
"instrument" - s.2(u)
"intangible" - s. 2(v)
"inventory" - s.2(w)
"money" - s.2(z)
"notice" - s.67(3)
"secured party" - s.2(kk)
"security" - s.2(11)
"security interest" - s.2(nn)

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1. Non-Possessory Security Interests in Intangibles, Mobile Goods, Securities, Instruments, Negotiable Documents of Title, Money and Chattel Paper
2. Security Interests in Extracted Minerals and Accounts Resulting from their Sale

1. Non-Possessory Security Interests in Intangibles, Mobile Goods, Securities, Instruments, Negotiable Documents of Title, Money and Chattel Paper

The single factor that all of the categories of collateral enumerated in section 7(1) have in common is that they either have no physical situs, or that any physical situs which they have at the date of attachment of any security interest may well be of little value as a basis for a choice of law rule because that situs is likely to be temporary. This being the case, a choice of law rule applicable to validity, perfection and effect of perfection and non-perfection of a security interest in the collateral should focus upon an alternative factor that is less arbitrary. A further aspect is that, in the context of a security interest in mobile goods, it would be too onerous a burden to require secured parties to comply with section 5(2) and its equivalent in every province into which the goods are taken. Section 7(1) provides that the validity, perfection and effect of perfection or non-perfection of a security interest in the categories of collateral set out in the section is governed by the law of the jurisdiction where the debtor is located when the security interest attaches. Accordingly, a general assignment of accounts due or to arise out of contracts between a debtor and his co-contractors in one or several jurisdictions is governed by and is to be perfected under the law of the jurisdiction where the debtor is located at the date of attachment of the security interest.[1] This is so even though the performance by the debtor pursuant to the contracts out of which the accounts have risen occurred entirely outside the jurisdiction where the debtor is located at the date of attachment, and even though payment of the account is to be made outside this jurisdiction. The choice of law rule contained in section 7 respecting security interests in goods is not an alternative to the choice of law rules set out in sections 5 and 6; it is an exclusive rule.[2] If, for example, a security interest is taken in goods falling within one of the categories enumerated in section 7, the only law relevant to the question of perfection of that security interest is he law of the location of the debtor at the date of its attachment. Accordingly, even if the collateral is located in Saskatchewan at the date of attachment or at a later time, and the competing interests arose out of a transaction in Saskatchewan, registration of the security interest in the Saskatchewan Personal Property Registry is irrelevant to the issue of priorities unless the debtor is located in Saskatchewan at the date the security interest attaches.

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[1] The common law appears to be unclear as to what law governs the validity of the assignment of a bare chose in action. Priorities as between successive assignments of the same chose in action would seem to be governed by the proper law of the chose. The need for clarification has been met by section 7(1).

[2] *Trailmobile Canada Limited* v. *Kindersley Transport Ltd.* (1986), 54 Sask. R. 1 (Q.B.).

This feature of the Act has implications not only for secured parties, but also for third parties who acquire interests in the collateral in Saskatchewan. Since section 5(2) applies only to security interests in goods perfected under the law of the jurisdiction in which the goods are situated when the security interest attaches, by implication, it exempts from reperfection in Saskatchewan a security interest falling within the scope of section 7(1). A person intending to acquire in Saskatchewan an interest in collateral falling within the categories of collateral enumerated in section 7(1) should be aware of the need to conduct a search as prescribed by the law of the jurisdiction or jurisdictions where the debtor has been located over a period of time during which prior security interests could have been created.[3] In some cases, this will not be possible without the full and honest co-operation of the debtor.

Under section 7(1)(a) the test for determining whether the appropriate choice of law rule is based on the debtor's location or the situs of the goods at the date of attachment involve a sometimes difficult determination as to what constitutes "goods which are of a type that are normally 'used in more than one jurisdiction". The equivalent provision of Article 9 of the Uniform Commercial Code (UCC 9-103(3)) provides some examples: "motor vehicles, trailers, rolling stock, airplanes, shipping containers, road building and construction machinery and commercial harvesting machinery". Canadian courts have held that trucks[4] and vans[5] may fall within this category.

It does not matter to the application of section 7 that the debtor has no intention to and in fact never does remove the goods from one jurisdiction to another. The test of the section focuses on the general use of the goods, not the particular use to which the debtor has put them. Accordingly, if the debtor is located in Alberta at the date of attachment of the security interest, the law of Alberta governs perfection and priorities even though one of the items of collateral under the security agreement is a motor vehicle kept for its entire useful life in Saskatchewan.

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[3] *Ibid.*

[4] *Westman Equipment Corporation* v. *Royal Bank of Canada*, [1982] 5 W.W.R. 475 (Man. Co. Ct.).

[5] *Trailmobile Canada Limited* v. *Kindersley Transport Ltd.*, *supra*, footnote 2.

Section 7 applies only to security interests in mobile goods held by the debtor as equipment or as inventory leased or held for lease by the debtor to others. Security interests in mobile goods held by the debtor as sales inventory or consumer goods fall within sections 5 or 6.

An incorporated debtor may be located in more than one jurisdiction and an unincorporated debtor may have his residence in one jurisdiction but his place of business in one or more different jurisdictions. Section 7(2) provides a test for identifying the relevant jurisdiction in such cases. The order of relevance is: (1) place of business, if only one; (2) the jurisdiction where the debtor has his chief executive office, if he has more than one place of business; and (3) the place where the debtor resides, if there is no place of business or no chief executive office. The section does not provide an answer in a case where the debtor has no place of business but has two places of residence, each in a different jurisdiction. An underlying assumption of the section is that, although a person may have two places of residence, a person does not reside in two places at the same time.

It may happen that the law applicable to the issue of perfection of a security interest is that of a jurisdiction that does not require public disclosure of the existence or potential existence of a security interest as an element of perfection. A person wishing to acquire in Saskatchewan an interest in collateral should not have to run the risk that there exists an undisclosed but perfected security interest in the collateral. While generally perfection of a security interest in collateral falling within the categories enumerated in section 7(1) is to be in accordance with the law of the debtor's location at the date of attachment, section 7(4) provides a separate rule applicable in any situation in which a non-possessory security interest is involved and the law otherwise applicable under section 7(1) does not provide for public registration or recording of security interests. Section 7(4) provides that such a security interest is unperfected unless it is perfected under the Saskatchewan Act. It does not, however, result in having the consequences of perfection or non-perfection determined under Saskatchewan law. This remains to be determined under the law of the jurisdiction in which the debtor was located at the date of attachment.

The location of the debtor is the central connecting factor in determining the law applicable to both initial and continued perfection of a security interest in collateral falling within the categories enumerated in section 7(1). A third party seeking to determine whether or not there exists a perfected security interest in collateral has only the location of the debtor as the guide to tell him where to look for records of such security interests. If the debtor has changed his location to another jurisdiction after he has given a security interest, a third party who wants to deal with the debtor after the change but who is unaware of the change, would reasonably assume that the public records of the jurisdiction where the debtor was then located would disclose the existence of any security interest the validity and perfection of which would be recognized in Saskatchewan. The effect of section 7(3) is to ensure that the reasonable assumptions of such persons are met. This is accomplished by requiring that the secured party perfect his security interest under the law of the jurisdiction where the debtor is located. The section gives conditional recognition of continued perfection after the debtor changes his location for the periods of time specified. In order to obtain temporary perfection, the security interest must remain perfected under the law of the debtor's prior location. During the period of temporary perfection, a third party cannot rely on the public records of the jurisdiction where the debtor is located. This, however, is a temporary inconvenience which disappears before or on the expiry of 60 days from the date the debtor changes his location.

2. Security Interests in Extracted Minerals and Accounts Resulting from their Sale

Section 7(3), to the extent that it applies to minerals, gas and oil to be extracted, states a choice of law rule applicable to the validity, perfection and effect of perfection or non- perfection that parallels the choice of law rule for goods under section 5(1). However, the choice of law rule stated with respect to accounts resulting from the sale of minerals at a minehead or gas and oil at a wellhead is a clear exception to the choice of law rule applicable under section 7(1) to intangibles generally.

No purpose would be served by taking a narrow technical approach to the question as to what constitutes a sale at a minehead or wellhead. A sale from storage facilities close to the mine or well should be seen as being within reference to a sale as set out in the section.

CONFLICT OF LAWS: CONFLICT IN PRIORITY RULES: PROCEDURAL AND SUBSTANTIVE ISSUES

8.- (1) Except as otherwise provided in this Act, when goods, other than those mentioned in subsection (2), securities, instruments, negotiable documents of title, money and chattel paper are dealt with in two or more jurisdictions and a conflict exists between the priority rules of the jurisdictions:

(a) the priority rules of the last jurisdiction, in which the collateral was dealt with in such a way as to give rise to an interest in conflict, prevail, if all interests in conflict were perfected by registration;

(b) the priority rules of the last jurisdiction, in which a conflicting possessory security interest in the collateral was taken, prevail.

(2) Subject to subsection 7(4), when intangibles or goods which are of a type that are normally used in more than one jurisdiction, if such goods are equipment or inventory leased or held for lease by a debtor to others, are dealt with in two or more jurisdictions and a conflict exists between the priority rules of the jurisdictions, the priority rules of the jurisdiction, in which the debtor is located when the last dealing occurred which gave rise to the conflict, prevail.

(3) For the purposes of this section, collateral is dealt with when it is:

(a) purchased;

(b) seized under judicial process; or

(c) becomes subject to a non-consensual lien or charge.

(4) Notwithstanding sections 5, 6 and 7 and subsections (1) and (2) of this section:

(a) all procedural issues involved in the enforcement of the rights of a secured party against collateral other than intangibles are governed by the law of the jurisdiction in which the collateral is located at the time of the exercise of such rights;

(b) all procedural issues involved in the enforcement of the rights of a secured party against intangibles are governed by the law of the forum;

(c) all substantive issues involved in the enforcement of the rights of a secured party against collateral are governed by the proper law of the contract between the secured party and the debtor.

Definitional Cross References:

"chattel paper" - s.2(e)
"collateral" - s.2(f)
"debtor" - s.2(k)
"document of title" - s.2(m)
"equipment" - s.2(n)
"goods" - s.2(s)
"instrument" - s.2(u)
"intangible" - s.2(v)
"inventory" - s.2(w)
"money" - s.2(z)
"purchase" - s.2(ff)
"security" - s.2(ll)
"secured party" - s.2(kk)
"security interest" - s.2(nn)

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1. Choice of Priority Rules
2. Law Applicable to Enforcement of Security Interests

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1. Choice of Priority Rules

Section 8 provides guidance to Saskatchewan courts in determining which of two (or more) sets of priority rules are to govern when, under the choice of law rules prescribed in sections 5 or 7, more than one set of priority rules are recognized by Saskatchewan law. The following scenario displays the operation of the section.

D gives to SP1 a security interest in goods. SP1 perfects his interest by registration in province A where D was located at the date the security interest attached. D takes the collateral to province B and immediately thereafter gives a security interest in it to SP2. The law of province B does not recognize the perfected status of SP1's security interest. Assume that the relative priority positions with respect to the two security interests is litigated in a Saskatchewan court. Under section 5(1) the validity and perfection of both security interests must be recognized since they both attached at the time when the collateral was situated within the jurisdiction. However, under section 8(1)(a) the priority rules of province B are to be applied by Saskatchewan courts since B was the last jurisdiction in which the collateral was dealt with in such a way as to give rise to an interest in conflict.

Section 8(1)(b) states choice of law rule applicable where a possessory security agreement is involved, while section 8(2) provides a choice of law rule to determine the applicable set of priority rules where collateral falling within the category set out in section 7(1) is involved.

2. Law Applicable to Enforcement of Security Interests

When specifying the law applicable to matters of enforcement, section 8(4) maintains the traditional private international law distinction between procedural matters and substantive matters. In the case of tangible property, the procedural rules of the jurisdiction where the goods are located apply to the enforcement of a security interest in the property. In the case of intangible property, procedural matters are to be governed by the law of the forum. This makes good practical sense and is based on the same reasoning that led common law courts to conclude that all procedural matters relating to enforcement of rights in courts are to be governed by the law of the jurisdiction in which those rights are being asserted *(lex fori)*. The practical effect of these provisions is to deny to the parties the freedom to choose the law applicable to procedural aspects of enforcement of security interests which they have under section 8(2)(c) with respect to substantive aspects.

The section does not provide guidance on the question as to what constitutes a "procedural issue" as distinct from a "substantive issue" involved in the enforcement of the rights of a secured party against the collateral. The distinction has been addressed on several occasions by Canadian courts in the context of statutory limits on secured creditors' enforcement rights.[1]

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1. See generally, *Commercial Corporation Securities Limited* v. *Nichols*, [1933] 1 W.W.R. 484 (Sask. C.A.); *Canadian Acceptance Corporation Ltd.* v. *Matte* (1957), 9 D.L.R. (2d) 304 (Sask. C.A.); *Traders Finance Corporation Limited* v. *Casselman*, [1960] S.C.R. 242; *Industrial Acceptance Corporation Ltd.* v. *Jordan* (1969), 6 D.L.R. (3d) 625 (N.W.T. Terr. Ct.); *Re Harris and Hirst Enterprises Ltd.* (1975), 55 D.L.R. (3d) 24 (Man. Q.B.); *Can-Alta Carriers Ltd.* v. *Ford Motor Credit Co. of Canada Ltd.* (1974), 49 D.L.R. (3d) 319 (Alta. App. Div.); *Province of Alberta Treasury Branches* v. *Granoff* (1984), 15 D.L.R. (4th) 295 (B.C.C.A.).

The general approach adopted by the courts is to seek to separate a right itself, which is substantive, from the measures required to enforce that right, which are procedural.

EFFECTIVENESS OF SECURITY AGREEMENT

9. Except as otherwise provided in this or any other Act, a security agreement is effective according to its terms.

Definitional Cross References:

"security agreement" - s.2(mm)

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1. Scope of Provision
2. Typical Provisions Contained in Security Agreements

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1. Scope of Provision

The pronouncement contained in section 9 that a security agreement is effective according to its terms is subject to an important qualification: the agreement is effective according to its terms "except as otherwise provided in this or any other Act". In fact many of the provisions of the Act are mandatory. Most of the priority rules are of this nature. A secured party cannot validly contract for a higher priority position than is provided in the priority rules of the Act, other than through a subordination agreement. Similarly, most of the rules dealing with remedies upon default (Part V) are mandatory and cannot be varied by contract.

However, within this framework there is latitude given to the parties to tailor a security agreement to their needs. The security agreement may create a security interest in a particular item of collateral, a particular class of collateral, or in all the present and future acquired property of the debtor. The agreement may secure a single existing obligation, or it may secure future obligations as well.

2. Typical Provisions Contained in Security Agreements

In addition to identifying the debtor and secured party and describing the collateral, a written security agreement may contain the following provisions:

(a) A description of the obligation secured by the collateral. The agreement should generally indicate whether the security interest is intended to secure future advances, and should indicate whether the secured party is obliged to make such future advances.[1] It is not strictly necessary to include a term providing that the security interest secures reasonable expenses incurred in the custody and preservation of the collateral,[2] or the reasonable expenses in disposing of the collateral,[3] since the Act expressly provides that the security interest secures such obligations.

(b) A granting clause evidencing that the debtor grants a security interest (or that the seller reserves a security interest) in the collateral described to secure payment and performance of the obligation.[4]

(c) An after-acquired property clause that provides for a security interest in collateral in which the debtor has no rights at the time the security agreement is entered into but in which he acquires an interest any time during the life of the agreement[5] (assuming that this is part of the bargain between the parties).

(d) Warranties on the part of the debtor that the collateral is genuine, that the debtor has good title to the collateral and that the collateral is free of other security interests or encumbrances (assuming that this is part of the bargain between the parties).

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[1] See section 14.

[2] Section 17(2).

[3] Section 59(1)(a).

[4] See the commentary accompanying 10. Note that a clause providing for a reservation of a security interest is not different in legal effect to a clause providing for the granting of a security interest.

[5] See section 13.

(e) Various covenants on the part of the debtor. These may be in the form of positive covenants on the part of the debtor under which the debtor promises to keep the collateral in good repair, to pay taxes and to insure the collateral, to notify the secured party of any loss or damage, to give to the secured party additional security that it may request and to provide the secured party with such financial information that it may request. The security agreement may also contain negative covenants under which the debtor promises not to encumber or sell the collateral.

(f) A licence providing that the debtor may dispose of the collateral in the ordinary course of business of the debtor[6] (assuming that the collateral is inventory).

(g) A comprehensive list of the "events of default".[7] These may include the non-payment of any instalment, death, dissolution of a corporate debtor, insolvency or bankruptcy, and any encumbrance, execution or process of law that becomes enforceable against the collateral.

(h) An acceleration clause providing that the entire unpaid balance of the obligation becomes due and payable upon the occurrence of any event of default. This provision must be read in light of section 62(2) of the Act.[8] An "insecurity clause" that attempts to give the secured party the right to deem himself insecure so as to put the debtor in default is modified by section 16 of the Act, and is in some circumstances prohibited by section 17 of The Limitation of Civil Rights Act.[9]

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[6] See section 28(1)(a).

[7] See the definition of default in section 2(1). The security agreement must set out the events of default in cases other than a failure to pay or otherwise perform the obligation secured. See also the commentary accompanying section 56.

[8] Section 62(2) provides that the debtor has the right to reinstate the security agreement by curing the default irrespective of the acceleration clause.

[9] R.S.S. 1978, c. L-16, s.17. See the commentary accompanying section 16 for a more detailed discussion of these two provisions.

(i) A list of the remedies available on default. This may simply be an incorporation by reference of the remedies in Part V of the Act. The secured party has a limited ability to vary the remedies under Part V.[10] The failure to include a list of remedies on default has created problems for some secured parties.[11] The security agreement may also provide for the appointment of a receiver or a receiver-manager.[12] It should be noted that other provincial legislation may limit the exercise of the secured party's remedies against the goods[13] as well as his right to sue for any deficiency.[14]

(j) Various miscellaneous provisions such as a provision permitting the secured party to grant extensions of time without prejudice to its rights.

Sample security agreements are reproduced in the following works:

R.H. McLaren, Secured Transactions in Personal Property in Canada (1979), Vol. 2, Part V, "Transactional Documents".

M.W. Milani, "Drafting Security Agreements and Notices" (1985), Continuing Legal Education of Saskatchewan Seminar on the Personal Property Security Act.

Care should be taken to ensure that sample agreements from outside jurisdictions are appropriately modified to reflect the peculiarities of Saskatchewan law which in some important respects differs from that of other Canadian jurisdictions.

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[10] See section 56(8).

[11] See *Mid-Canada Radio Communications Ltd.* v. *Mechanical Services (1979) Ltd.*, [1984] 2 W.W.R. 569, 31 Sask. R. 286 (Q.B.). But see the commentary accompanying section 58. See also the annotation to the case in (1984), 25 B.L.R. 187.

[12] See section 56.

[13] See the commentary accompanying section 58.

[14] See the commentary accompanying section 60.

EVIDENCE OF A SECURITY AGREEMENT

10.-(1) No security interest is enforceable against a third party unless:

(a) the collateral is in the possession of the secured party; or

(b) the debtor has signed a security agreement that contains a description of the collateral which enables the type or kind of collateral taken under the security agreement to be distinguished from types or kinds of collateral which are not collateral under the security agreement, and, in the case of a security interest taken in all of the debtor's present and after-acquired property, a statement indicating that a security interest has been taken in all of the debtor's present and after-acquired property is sufficient.

(2) A security interest in proceeds is not unenforceable against a third party by reason only that the security agreement does not contain a description of the proceeds as required by clause (1)(b).

Definitional Cross References:

"collateral" - s.2(f)
"debtor" - s.2(k)
"proceeds" - s.2(ee)
"secured party" - s.2(kk)
"security agreement" - s.2(mm)
"security interest" - s.2(nn)

1. Unenforceability
2. Collateral in Possession of Secured Party
3. Written Security Agreement - Granting Clause
4. Written Security Agreement - Collateral Description
5. Written Security Agreement - Debtor's Signature
6. Other Aspects of a Security Agreement
7. Proceeds

1. Unenforceability

Section 10 has aspects of a Statute of Frauds provision. A security agreement is not enforceable against third parties unless the requirements of section 10 have been satisfied. The security agreement is, however, enforceable as between the secured party and the debtor. Thus, an oral non-possessory security agreement can be enforced against a debtor, but is ineffectual against third party claims.

Unenforceability is related to the concept of attachment. Section 12(1)(c) of the Act provides that a security agreement does not attach until it becomes enforceable under section 10 (except for the purpose of determining rights as between the secured party and the debtor). One must be careful to distinguish Ontario case authority, since the Ontario PPSA has no equivalent to section 12(1)(c). In *Rogerson Lumber Co. Ltd.* v. *Four Seasons Chalet Ltd.*[1] Mr. Justice Houlden of the Ontario Court of Appeal held that the writing requirement in section 10 could be satisfied at any time before proceedings are taken to enforce it. Because the Ontario Act has no equivalent to section 12(1)(c), it is possible to have an attached (and even a perfected) security interest that is unenforceable for noncompliance with section 10. A similar situation cannot arise in Saskatchewan. A security interest does not attach, except for the purposes of enforcing *inter partes* rights, until section 10 is satisfied. Accordingly, a security interest created or provided for in a agreement that does not comply with section 10 is subordinate to other interests acquired in the collateral. If at some later time the requirements of section 10 are met, only then will the security interest attach.

A security agreement may secure performance of a guarantee rather than a primary obligation. Section 4 of the Statute of Frauds[2] will normally apply to a contract of guarantee. However, the Ontario Court of Appeal in *Re M.C. United Masonry Ltd.*[3] suggested, without deciding the issue, that the Statute of Frauds may have no application where the guarantee is contained in a security agreement, and that the enforceability of the guarantee may be determined by section 10.

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[1] (1980), 113 D.L.R. (3d) 671 (Ont. C.A.).

[2] (1677), 29 Car. II, c.3 (Imp.).

[3] (1983), 21 B.L.R. 172, 2 P.P.S.A.C. 237 (Ont. C.A.).

2. Collateral in Possession of Secured Party

Section 10(1)(a) provides that no written security agreement is required if the secured party is in possession of the collateral. For this section to apply, the debtor must have given possession of the collateral to the creditor with the intention of creating a security interest. Where there is an initial perfection by possession by the secured party, but later the collateral is released to the debtor and a financing statement is registered, it is essential that the secured party have the debtor sign a security agreement prior to the surrender of possession in order to remain in compliance with section 10. Failure to do so will result in loss of attachment and perfection.

The Act does not define possession of the secured party for the purposes of section 10(a). This should be contrasted with section 24(2) which provides that for the purposes of determining perfection by possession under 24(1) "a secured party is deemed not to have taken or retained possession of collateral which is in the apparent possession or control of the debtor or the debtor's agent". It is unclear whether a similar rule will be applied in respect of section 10. There is common law authority to the effect that a secured party does not lose possession if he delivers the collateral for some limited purpose of the secured party since the debtor obtains possession as agent for the secured party, who continues in constructive possession.[4] The question is significant where there has been an initial compliance with section lO(a) - the secured party is given possession of the collateral - but the collateral is later retransferred to the debtor, who relies upon the temporary perfection provisions in section 26(2). If the secured party is held to have lost possession, his security interest may be argued to have become unenforceable and therefore unattached unless he takes the precaution of having the debtor sign a security agreement (traditionally a letter of trust or trust receipt) before surrendering possession. An alternative approach is to conclude that section 26(2) overrides section lO(a) and deems the security interest perfected for all purposes of the Act. In order to avoid any controversy on this point, the best course is for the secured party to take the precaution of having a security agreement signed by the debtor before releasing the collateral to him.

There is a further question as to whether repossession of collateral by a secured party is sufficient to constitute possession of the collateral for the purposes of section lO(a), or whether "possession" denotes the consensual surrender of possession by way of security (i.e., a pledge), as opposed to possession for the purposes of realization (i.e., seizure or repossession). A very similar issue arises concerning perfection by possession: does a seizure of the collateral by the secured party have the effect of perfecting a security interest? The conflicting views on this question are examined in detail in the commentary accompanying section 24.

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[4] *North-Western Bank, Ltd.* v. *Poynter*, [1895] A.C. 56, [1891-4] All E.R. Rep. 754 (H.L.).

3. Written Security Agreement - Granting Clause

By virtue of section 10(1)(b), a security interest is not enforceable against a third person unless the debtor has signed a security agreement that contains a description of the collateral which enables the type or kind of collateral taken under the agreement to be distinguished from types or kinds of collateral which are not collateral under the security agreement. A controversial question that arises in the context of section 10 is whether the written document must on its face manifest an intention to create a security interest. The Manitoba Court of Queen's Bench in *Guntel* v. *Kocian*[5] indicated that an express granting clause is not required. The court held that the following writing satisfied section 10:

> I Bryan Ward owe Fay Kocian $7,699.99 plus the interest of the Bank of Nova Scotia for 1979 GMC, truck SETCS249B517842.
>
> Bryan Ward (signed)

The court indicated that a written security document must in some way evidence that the secured party has an interest in the collateral described. It need not be a formal granting provision such as "the debtor grants a security interest" to the secured party, but there must nevertheless be some indication in the written document that the secured party has an interest in the collateral. This is undoubtedly an accurate interpretation of the Act. The troubling feature of this decision is that the court made a finding of fact that the written document did evidence an intention that the creditor should have some form of interest in the property. It seems difficult to distinguish the document in question from an ordinary bill of sale under which there is no intention that the transferor should retain any interest in the property. Case authority in the United States is divided on whether a written granting clause is required.[6] However, it is questionable whether these cases have any persuasive value on this point so far as section 10 of the Saskatchewan Act is concerned. If the writing requirement under Article 9 of the UCC is not met, the security interest is enforceable not only between the secured party and third parties, but between the debtor and secured party as well.[7] Many of the cases from the United States involve reliance on the absence or inadequacy of a written security agreement by one of the parties to a security agreement as a method of escaping liability to the other party. In this context courts are understandably reluctant to insist on strict compliance with statutory writing requirements. The writing requirement of section 10 of the Saskatchewan PPSA presumably exists to allow a third party to verify that a security interest has been created. This requirement complements section 18 of the Act, which provides a mechanism by which a third party can obtain a copy of the security agreement. Thus a strong case can be made that the written agreement must in some manner evidence that the secured party has an interest in the described collateral.

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[5] [1985] 6 W.W.R. 458 (Man. Q.B.). See also *Re Ayerst* (1984), 27 B.L.R. 43, 4 P.P.S.A.C. 81, per Catzman J. explaining *Re 471283 Ontario Limited (No. 1) c.o.b. Dunlop Sports* (1982), 42 C.B.R. (N.S.) 206, 2 P.P.S.A.C. 83 (Ont. S.C.).

There is no requirement that a security agreement be contained in a single document. For example a reservation of a security interest and description of the collateral may be contained in one document, while the debtor's signature is contained on another.[8] Controversy has arisen in the United States over whether a financing statement can form part of the security agreement.[9] In principle there is no reason why it should not. For example, a case might arise where a promissory note is signed by the debtor and contains on it a notation: "security as per financing statement". There is no good reason for holding such an agreement unenforceable.[10] Of course, it would be foolish for a secured party to deliberately rely upon such a haphazard security agreement.

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[6] See P.F. Coogan & J.B. McDonnell, "The Intelligent Lawyer's Guide to Secured Transactions After More Than Three Decades Under the Code" in Chapter 2 of *Secured Transactions under the Uniform Commercial Code* (1986), at para. 2.06 [1].

[7] U.C.C. 9-203.

[8] *Midland-Ross of Canada Ltd. v. Bachan Aerospace of Canada* (1983), 3 P.P.S.A.C. 21 (Ont. S.C.).

[9] *In re Numeric Corp.*, 485 F. 2d 1328, 13 U.C.C. Rep. 416 (1st Cir. 1973). But see *American Card Co., Inc.* v. *H.M.H. Co.*, 196 A. 2d 150, 1 U.C.C. Rep. 447 (R.I. 1963).

4. Written Security Agreement - Collateral Description

The Act views the itemization of the actual collateral that is subject to a security interest to be of little importance. The security agreement need not specify every item in which a security interest is taken. This information can be established through section 18(1)(b) which provides a mechanism by which a third party may obtain from the secured party a written approval or correction of an itemized list of collateral submitted to the secured party.

The description of the collateral necessary to satisfy section 10 is in identical terms to the description required by the regulations for the financing statement.[11] In all likelihood, cases relating to the description requirements of financing statements can be applied cases where the enforceability of the security agreement is at issue. For a discussion of these cases see the commentary accompanying section 44. Section 10(1)(b) provides that a description to the effect that a security interest is taken in all the debtor's present and after-acquired property is a sufficient description.[12]

Even if the description requirement is not met, it is possible that this defect will be excused by virtue of section 66. Section 66(1) provides that the validity or effectiveness of a document is not affected by a defect, irregularity, omission or error in the execution of it unless it is seriously misleading. This provision was applied by Noble, J. in *International Harvester Credit Corporation of Canada Ltd.* v. *Bell's Dairy Limited.*[13] A security agreement contained a schedule setting out a description of the collateral. One of the trucks was described in the schedule by serial number and did not include the word "truck". Applying section 66, the court held that this minor deficiency in the collateral description did not affect the validity of the security agreement.

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[10] See *In re Bollinger Corp.*, 614 F. 2d 924, 28 U.C.C. Rep. 289 (3d Cir. 1980). More controversial is the situation where there is a promissory note and a financing statement, but nothing to connect the two. See *In re EJM, Inc.*, 28 U.C.C. Rep. 192 (N.D. Ga. (Bankr.) 1979) in which such an arrangement qualified as a security agreement. But see *Pontchartrain State Bank* v. *Poulson* 684 F. 2d 704, 34 U.C.C. Rep. 693 (10th Cir. 1982); *In re Cambridge*, 37 U.C.C. Rep. 618 (W.D. Mo. (Bankr.) 1983).

[11] See *The Personal Property Regulations*, R.R.S. P-6.1, Reg. 1, s.5(1)(j).

[12] See also *Terra Power Tractor Co. Ltd.* v. *Touche Ross Ltd.* (1985), 42 Sask. R. 102 (Sask. Q.B.).

[13] (1984), 35 Sask. R. 187 (Sask. Q.B.).

A more extreme example of judicial tolerance of noncompliance with section 10 may be found in the decision of the Ontario Court of Appeal in *Re Ayerst.*[14] In that case, a schedule describing the collateral had been wholly omitted. Nevertheless, the court applied the Ontario equivalent to section 66 of the Saskatchewan PPSA. The case may be of little persuasive value in Saskatchewan because in this respect the Ontario PPSA is very different from the Saskatchewan Act. Section 4 of the Ontario Act provides that the error or defect does not invalidate the document unless it actually misleads a person. Under section 66(1) of the Saskatchewan Act, the error or defect is fatal if it is "seriously misleading".[15] A strong argument can be made that the total absence of a description of the collateral would be seriously misleading to any party who has obtained a copy of the security agreement through section 18. Further support can be found in section 66(2):

> (2) Failure to provide a description required by this Act or the regulations in relation to any type or kind of collateral in a document does not affect the validity or effectiveness of the document as it relates to any other collateral.

The converse of this section is that failure to provide a description will lead to the invalidation of the security agreement in relation to the collateral that is not properly described.

5. Written Security Agreement - Debtor's Signature

Section 10(1)(b) requires that the debtor sign the security agreement. In the case of a corporation or other commercial entity, the person signing must have the authority to sign a security agreement. Section 10(1)(b) is not satisfied where the security agreement is contained on work orders and invoices that are signed by employees of the debtor who may have the authority to acknowledge delivery of goods, but who do not have the authority to enter into security agreements on behalf of the debtor.[16]

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[14] (1984), 27 B.L.R. 43, 4 P.P.S.A.C. 81 (Ont. C.A.).

[15] See the commentary accompanying section 44 for a more detailed examination of the cases dealing with this section in the context of non-compliance with the Regulations prescribing the contents of financing statements.

Where the debtor and the owner of the collateral are not the same person (as in the case where the owner grants a security interest in his property to secure the obligation of the debtor: a form of secured guarantee), then the signature contemplated by section 10(1)(b) is the signature of the owner and not of the primary debtor. This is made clear in the definition of debtor in section 2(k).

Section 66(1) deals with defects, irregularities, omissions or errors in the "execution" of documents to which the Act applies. The reference to execution must be taken to refer to the signing and delivery of documents. Defects in execution of a document are likely to be raised in situations in which the requirements of a section have not been satisfied: i.e., the security agreement is unenforceable because the debtor has not signed a security agreement (and the secured party has not taken possession of the collateral). It is most unlikely that the Legislature intended that this requirement can be circumvented through an application of section 66(1). The primary reason for requiring a signed security agreement is to facilitate the operation of section 18(1)(d). Copies of security agreements are not put in the public record. Section 18 is a central feature of the notice registration system of the Act since it provides a mechanism by which third parties may discover the state of a debtor's title to property that he is offering for sale or as collateral. A signed security agreement is the best evidence of the existence of a security interest. To accept that the requirements of section 10 can be ignored is to frustrate the legislative policy underlying the registry system of the Act. The absence of a signature on a written record of a security agreement should always be regarded as seriously misleading for the purposes of section 66(1) if it is assumed that the test is objective rather than subjective. See the commentary accompanying section 44. The reference in section 66(1) to a deficiency in the execution of a document should be seen as referring to minor errors in the method of execution, such as a minor spelling error in the debtor's signature.

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[16] *Atlas Industries* v. *Federal Business Development Bank* (1983), 3 P.P.S.A.C. 39 (Sask. Q.B.).

6. Other Aspects of a Security Agreement

It is essential to distinguish the issue of legal sufficiency under section 10 from an inquiry as to the actual terms of the security agreement. There is no requirement that terms other than those required by section 10 be in writing. The terms may be in writing, they may be oral, or they may be partially oral and partially in writing.

By virtue of section 9, a security agreement is effective according to its terms, although sometimes it will be difficult to determine precisely what those terms are. For instance, the security agreement may provide that the debtor grants a security interest in all his personal property. It is a matter of construction whether this was intended to cover after-acquired property or if it was intended to cover only the personal property that belonged to the debtor at the date the security agreement was entered into. Similarly, where the agreement is silent, it will be a matter of construction whether the security interest was intended to secure future advances, or whether it was restricted to the initial advance. There is nothing in the Act that requires that such terms be in writing.[17] It should be open to establish such terms by parol evidence in appropriate cases. However, a draftsman is well advised to expressly include such terms in the written document. Ideally, the written security document should, in addition to complying with section 10:

(a) evidence the creation of the security interest in collateral;

(b) indicate whether the security interest is intended to attach to after-acquired property;

(c) indicate the obligation secured by the security interest and indicate if the security interest secures future advances.

7. Proceeds

Section 10(2) provides that a description of the proceeds is not required in the security agreement. Indeed, it is not strictly necessary for the security agreement to claim a security interest in proceeds at all, since section 28(1)(b) provides that a security interest extends to the proceeds. However, a description of the proceeds on a financing statement will often be needed to perfect a security interest in proceeds. See section 28(2).

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[17] See *George O. Hill Supply Ltd.* v. *Little Norway Ski Resorts Ltd.* (1980), 1 P.P.S.A.C. 190 (Ont. Dist. Ct.) where the court held that the written security agreement need not contain the amount of the obligation secured or the dates for payment.

DELIVERY OF COPY OF SECURITY AGREEMENT

11. The secured party shall deliver a copy of the security agreement to the debtor within 10 days after it is executed, and, if the secured party fails to do so after a request by the debtor, a judge may, on application by the debtor, make an order for the delivery of such a copy to the debtor and may make any order as to costs that he considers just.

Definitional Cross References:

"debtor" - s.2(k)
"judge" - s.2(x)
"secured party" - s.2(kk)
"security agreement" - s.2(mm)

Section 11 provides that a secured party must deliver a copy of a security agreement to the debtor within 10 days after its execution. No security agreement is required where the secured party obtains possession of the collateral (section 10(1)(a)). Nevertheless, if such a secured party has had the debtor sign a hypothecation agreement or other security agreement where a pledge is involved, section 11 obligates the secured party to deliver a copy of it to the debtor. Section 11 further provides a mechanism by which a debtor may obtain a court order for delivery of a copy of the security agreement if faced with a recalcitrant secured party.

TIME OF ATTACHMENT OF SECURITY INTEREST

12.-(1) A security interest attaches when:

(a) value is given;

(b) the debtor has rights in the collateral; and

(c) except for the purpose of enforcing *inter partes*

rights of the parties to the security agreement, it becomes enforceable within the meaning of section 10;

unless the parties intend it to attach at a later time, in which case it attaches in accordance with the intentions of the parties.

(2) For the purposes of subsection (1), a debtor has rights:

(a) in goods purchased by him under an agreement to sell, when he obtains possession of them pursuant to the sales contract;

(b) in goods leased to him, hired by him or delivered to him under a consignment, when he obtains possession of them pursuant to the lease, hiring agreement or consignment.

(3) For the purposes of subsection (1), a debtor has no rights in:

(a) crops until they become growing crops;

(b) the young of animals until they are conceived;

(c) oil, gas or other minerals until they are extracted; or

(d) timber until it is cut.

Definitional Cross References:

"collateral" - s.2(f)
"consignment" - s.2(g)
"debtor" - s.2(k)
"goods" - s.2(s)
"security interest" - s.2(nn)
"value" - s.2(qq)

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1. Nature of Attachment
2. Value
3. Debtor has Rights in Collateral
4. Postponement of Attachment

SECTION 12

1. Nature of Attachment

Attachment denotes the time when the security interest comes into existence. Time of attachment is significant for three reasons. First, it is important in determining the rights between the secured party and debtor. If a security interest has not attached to a particular item of collateral, the creditor will not have a security interest in it and therefore will not be able to exercise the remedies set out in Part V of the Act against the collateral. Second, time of attachment may be significant in determining the rights of third parties. If a security interest has not attached to a particular item of collateral, no security interest has been created in it and the debtor can transfer his interest to a third party. If the security interest subsequently attaches, then it attaches only to whatever interest, if any, that has been retained by the debtor. This is subject to one qualification. Where the transfer of the interest to a third party involves the granting of a security interest or deemed security interest, the priority will generally be determined by the application of the Act's priority rules irrespective of whether the security interest had attached after the second security interest came into existence. Third, time of attachment can be an important factor in determining the law applicable to the validity and perfection of a security interest under sections 5 and 7 of the Act.

Section 12(1) provides that, as between the debtor and creditor, the security interest attaches when value is given and the debtor has rights in the collateral. Where the question of attachment involves the rights of third parties, there is an additional requirement that the security agreement is enforceable within the meaning of section 10 (i.e., that the secured party be in possession of the collateral, or that the debtor has signed a written security agreement that describes the collateral by type or kind).

2. Value

The first pre-requisite for attachment is that value be given. Value is defined in section 2(qq). It encompasses any consideration sufficient to support a simple contract and includes an antecedent debt or liability. It is unnecessary that new value be given. Consequently, a creditor who advanced a loan on an unsecured basis may thereafter transform this arrangement into a secured credit transaction by subsequently entering into a security agreement with the debtor. However, the creditor will not be assured of priority over unsecured creditors since the transaction may be struck down as a fraudulent preference if the debtor granted the security interest while insolvent.[1]

It is not necessary that money actually be advanced to the debtor. A binding commitment to give credit at some later date satisfies the definition of "value". But if the making of the advance is completely at the discretion of the secured party, then the requirement of giving value will not have been met unless the secured party has committed himself to give consideration to the debtor in some other form. In principle there should be no objection that the commitment is subject to conditions. For example, the obligation to make advances may be conditional upon the debtor having assets equal to 125% of the total advances.

There is no requirement that the person granting the security interest receive the value.[2] A person may grant a security interest in his property to a secured party to secure a loan payable to a third party. If the primary debtor defaults, the secured party may proceed against the collateral subject to the security interest.

3. Debtor has Rights in Collateral

The second element necessary for attachment is that the debtor must have "rights in the collateral". The clearest case will occur where the debtor has full ownership of the collateral. However something less than full ownership will suffice. Sections 12(2) and (3) supply further detail as to when the debtor is considered to have rights in the collateral. Section 12(2) indicates that the debtor has rights in the goods under an agreement for sale, lease, agreement of hire or consignment when he obtains possession of the goods. This statutory presumption should not be read as restricting the applicable common law rules. If a debtor obtains rights in the collateral before he obtains possession, the requirement of section 12(1)(b) will have been met when those rights are acquired.

To determine what constitutes rights in the collateral, one must look to traditional property law concepts. This is expressly recognized by section 64(5) of the Act which provides that the principles of the common law, equity and the law merchant continue to apply except insofar as they are inconsistent with the express provisions of the Act.

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[1] See *The Fraudulent Preferences Act*, R.S.S. 1978, c. F-21; *Bankruptcy Act*, R.S.C. 1970, c. B-3, s.73. And see *Re Dyck* (1982), 21 Sask. R. 93 (Q.B.); *Re Carpet Warehouse (Saskatoon) Ltd.* (1983), 25 Sask. R. 192 (Q.B.).

[2] This is confirmed by the definition of "debtor" in section 2(k).

The common law position has been described by Professor R.M. Goode:[3]

> A person's claim to an asset may be by virtue of either a real right *in* it or a personal right *to* it. He has a real right where title to an interest in the asset, whether absolute or limited, is vested in him. Thus, the owner of goods (in the sense of the one having the best title to them) has a real right in them, as does a mortgagee, a chargee, a person holding a defeasible possessory title and a person in possession by way of bailment or pledge. But claims to an asset may also be made by one who has no existing real right, merely a personal right to have the asset delivered or otherwise transferred to him .... [W]here B contracts to buy goods from S under an agreement for sale, then until title passes to B under the contract or possession of the goods is given to him he has no real rights over the goods, merely a contractual right to call for delivery and transfer of ownership.

This is entirely consistent with sections 12(1) and (2). The debtor must have real rights in the collateral. These real rights may be derived from ownership or they may be possessory in origin.

The consequences of this analysis will now be traced through a number of fact situations:

(a) Debtor in possession of stolen goods: A person in possession of goods belonging to another, but who wrongfully asserts dominion over the goods likely has, by virtue of his possessory interest,[4] sufficient rights to grant a security interest in them. However, the secured party obtains a security interest in the defeasible possessory title of the debtor which, although effective against any stranger, is not effective against the true owner. The true owner should therefore enjoy priority over the secured party.

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[3] *Commercial Law* (1982), at 69.

[4] *Armory* v. *Delamirie* (1722), 1 Stra. 505, [1558-1774] All E.R. Rep. 121 (K.B.); *Bird* v. *Fort Frances*, [1949] 2 D.L.R. 791 (Ont. H.C.).

(b) Possession by bailee: Section 12(2)(b) provides that a bailment for hire or a bailment for sale (a consignment) gives sufficient rights to the debtor for the purposes of section 12(1) when the debtor obtains possession. It is important not to confuse attachment with the priority rules contained in the Act. Suppose that a person enters into a true lease for a term of less than one year. Section 12(2)(b) provides that the person has sufficient rights in the leased goods to grant a security interest in them to a secured party. This does not mean that the secured party can claim priority over the lessor. The security interest attaches only to the interest of the lessee. The lease does not fall within the definition of a deemed security interest,[5] and therefore does not have to be perfected. If, however, the lease was for a term of more than one year, the lessor wouid again have sufficient rights to grant a security interest in the goods upon obtaining possession of them. If this security interest were perfected, the secured party would have priority over the lessor under section 35 if the lessor failed to register its interest. For the purposes of the Act's priority rules, no distinction is made based on whether the claimant's interest is proprietary or possessory.[6]

The debtor's possession may simply be for storage or safekeeping. Again, the bailee will have sufficient rights to grant a security interest in the goods, but the security interest will attach merely to the bailee's limited possessory interest and will often not constitute a valuable right. If the bailee is a repairman who is entitled to retain possession until payment is made by the owner, the secured party may obtain a valuable right against the owner. But since this right is based upon the repairman's possession of the goods, it persists only so long as he remains in possession of the goods.

(c) Debtor with voidable title: The debtor may in fact have ownership of the goods, but his title may be voidable. This may occur where a sale is induced by the buyer's fraud. The buyer obtains title to the goods, though the seller has the right to rescind the contract. The fraudulent buyer's ownership of the goods gives him sufficient rights in the goods to grant a security interest in them. After the security interest is taken, any rescission of the contract at the election of the seller will result in the title revesting in the seller, but only subject to the security interest.

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[5] Section 2(nn)(iii).

[6] *International Harvester Credit Corporation of Canada Ltd.* v. *Bell's Dairy Limited*, [1986] 6 W.W.R. 161, 50 Sask. R. 177 (Sask. C.A.).

(d) Exceptions to nemo dat: Situations may arise where the debtor has possession of the goods under circumstances which empower him to transfer title to the goods to a third party, even though he has not the right to do so. In such cases the debtor has sufficient rights in the goods for the purposes of section 12. The debtor's possession of the goods gives rise to a real right in them, so that he has sufficient rights in the property to satisfy section 12. It would follow that if the secured party can fit within one of the exceptions to *nemo dat*, his security interest may have priority over the interest of the true owner. For example, if the debtor remained in possession of the goods after having sold them, a pledge of the goods to a secured party may result in the secured party having priority over the ownership interest of the buyer unless the buyer has registered his security interest pursuant to section 26(1.1) of The Sale of Goods Act.[7]

4. Postponement of Attachment

Section 12(1) indicates that attachment may occur sometime after the prerequisites for attachment have been met, if the "parties intend that it should attach at some later time. For example, a guarantor may provide that a security interest granted by him should not attach to his assets unless and until the primary debtor fails to satisfy certain liquidity tests.

There is pre-PPSA judicial authority holding that a letter from a debtor to a creditor which states that the debtor agrees to provide security over specified property upon demand creates an equitable mortgage in favour of the creditor at the time the creditor makes the demand. Likely the best method of explaining the effect of such a "letter of comfort" under the PPSA is to view the letter as manifesting an intention that the security interest attach when the creditor makes the demand. If, however, the letter evidences an intention to grant a present security interest over specified property and is not pre-conditioned by the need for a demand, then the security interest should be viewed as attaching as soon as the prerequisites of section

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[7] R.S.S. 1978, c.S-1, am. S.S. 1979-80, c.39, s.4.

[8] *Bank of British Columbia* v. *Davis*, [1983] 1 W.W.R. 185 (Alta. Q.B.); *Groat* v. *Canadian Imperial Bank of Commerce* (1985), 42 Sask. R. 241 (Q.B.).

12(1) have been satisfied. This corresponds to the pre-PPSA view that such a letter would create an immediate equitable mortgage.[9]

The use of the floating charge requires special consideration. The floating charge was invented by the courts of equity and is therefore an equitable interest in the property by way of security. Under pre-PPSA law, the equitable charge did not attach to any specific item of property until the charge crystallized. Does the use of a floating charge provision in a security agreement demonstrate an intention that the pre-PPSA law should be delayed until the charge has crystallized? The Saskatchewan Court of Appeal in *Royal Bank of Canada* v. *G.M. Homes Inc.*[10] answered this question in the negative. The use of a floating charge form of security does not, in itself, raise a presumption that attachment is to occur at a later time. Accordingly, the security interest attached to the collateral at the date of execution of the security agreement.[11]

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[9] *Canadian Imperial Bank of Commerce* v. *Wicljowski, Wenaus & Co.* (1979), 1 Sask. R. 63 (Q.B.). But if the document is referred to as a "proposal" and contains a notation stating "if a conditional sales contract is desired the information required on the reverse side of the form must be supplied", and the parties never reach that stage in their negotiations, a court may conclude that the parties never reached an agreement and that therefore there was no intention to create a security interest: see *Manning* v. *Furnasman* Heating Ltd., [1985] 6 W.W.R. 1 (Man. C.A.).

[10] (1982), 34 Sask. R. 195, 10 D.L.R. (4th) 439 (Sask. C.A.).

[11] For further academic support for this position see R.C.C. Cuming, "Second Generation Personal Property Security Legislation" (1981-82), 46 *Sask. Law Rev.* 5, at 11-12; J.S. Ziegel, "Recent and Prospective Developments in the Personal Property Security Area" (1985), 10 *Can. Bus. L.J.* 131, at 148-54.

AFTER-ACQUIRED PROPERTY

13.-(1) When a security agreement provides for a security interest in after-acquired property, the security interest attaches in accordance with section 12 without specific appropriation by the debtor.

(2) No security interest in crops attaches under an after-acquired property clause in a security agreement unless the crops are grown within one year after the security agreement has been executed, except that a security interest in crops that is given in conjunction with a lease, purchase or mortgage of land may, if the parties so agree, attach to crops to be grown on the land concerned during the term of such lease, purchase or mortgage.

Definitional Cross References:

"debtor" - s.2(k)
"security agreement" - s.2(mm)
"security interest" - s.2(nn)

1. Scope
2. Security Interests in Future Crops

1. Scope

The debtor may wish to grant a security interest in property that he does not yet own, but which he will acquire in the future. The common law did not recognize the creation of security in such after-acquired property unless there was a new act of transfer at the time such property was acquired.[1] Equity took a different view. It recognized a charge on after-acquired property which arose automatically, without the need for a new act of transfer, the moment the debtor acquired the property.[2] The equitable charge or mortgage was, however, inferior to a legal mortgage. The equitable interest thereby created would generally be defeated by a third party who acquired the legal title to the property in good faith, for value, and without notice.

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[1] *Lunn* v. *Thornton* (1845), 135 E.R. 587 (C.P.).

[2] *Holroyd* v. *Marshall* (1862), 10 H.L. Cas. 191, 11 E.R. 999.

Under section 13 a debtor may grant a security interest in after-acquired property. The security interest will attach immediately upon the debtor's acquisition of rights in the property. See section 12(1). However, unlike an equitable mortgage or charge, the security interest in after-acquired property has equal status with a security interest in collateral in existence at the time the security agreement is executed.

Of course, it is still necessary that the parties intend that the security agreement should attach to after-acquired property. Occasionally a poorly drafted security agreement will not make it clear that a security interest is granted in after-acquired property. For example, when a security agreement provides that the debtor grants a security interest in "all personal property", an ambiguity arises. Was it the parties' intention that the security interest should attach only to the property owned by the debtor at the date the security agreement was executed, or was it their intention that it should attach to after-acquired property as well?

There are two separate questions that must be answered. The first is whether the failure to include an after-acquired property clause will render the security interest unenforceable against third parties in respect of the after-acquired property because of non-compliance with the description requirements in section 10. Some American courts[3] have held that an after-acquired property clause is required to satisfy the formal requirements of Article 9-203. However, Article 9-203 requires that the debtor sign a security agreement "which contains a description of the collateral", whereas section 10 merely provides that a security agreement describe the collateral by type or kind - perhaps suggesting that an after-acquired property clause is not required by section 10. On the other hand, section 10 indicates that a security interest in all the debtor's present and after-acquired property is sufficiently described if it contains "a statement indicating that a security interest has been taken in all of the debtor's present and after-acquired property". This seems to suggest that an after-acquired property clause is required - that a security interest in "all the debtor's property" is not sufficient. It is suggested that the better view is that a formal after-acquired property clause is not necessary, so long as an intention to cover future property can be otherwise established.

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[3] *In re World Wide Perfume, Inc.*, 7 U.C.C. Rep. 616 (M.D. Ala. 1969); *In re Middle Atlantic Stud Welding Co.*, 503 F. 2d 1133 (3d Cir. 1974).

The second question need only be asked if a court concludes that section 10 does not require the presence of an after-acquired property clause. If this is found to be the case, the second stage of inquiry is whether the parties to the security agreement intended the security interest to attach to after-acquired property. A stronger case can be made in favour of the secured party who is granted a security interest in "all inventory" or "all receivables". Such property is in a constant state of flux. It is recognized commercial practice that security interests in inventory and receivables include after-acquired property.[4] A security interest in inventory or receivables that does not cover after-acquired property will be unusual and frequently of little value. The secured party is on weaker ground in the case of a consumer transaction under which the secured party takes a security interest in all the property of the consumer debtor. A court might well conclude that the security agreement should be construed *contra proferentum* against the secured party and refuse to imply an after-acquired property feature.

2. Security Interests in Future Crops

Prior to the coming into force of the PPSA a secured party possessed only a limited ability under provincial law to take security interests in growing crops. Although a seller could sell seed grain under a conditional sales contract, the conditional seller's interest was lost upon the seed being planted.[5] The Bills of Sale Act[6] provided that no mortgage should bind a growing crop, or a crop to be grown in the future, unless it was executed as a security for the purchase price of seed grain or necessaries.[7] Necessaries were defined as meat, groceries, flour, clothing, coal or binder twine. Furthermore, no seed grain mortgage could be given upon any crop not sown within one year of the date of its execution.[8]

Section 13(2) is borrowed directly from the pre-1972 version of Article 9-204(a) of the Uniform Commercial Code. A secured party is now free to take a security interest in growing crops even though it does not secure the purchase price of grain or necessaries. However, the security interest will not attach under an after-acquired property clause in crops that are grown more than one year after the security interest has been executed. This rule does not affect the registration of a financing statement covering the crops. Accordingly, so long as the financing statement has not expired, the secured party will enjoy priority over subsequent secured parties if it has a fresh security agreement executed every year. The restriction was repealed by the 1972 amendments to the UCC on the basis that it was overly paternalistic and unworkable, but has been retained in all Canadian PPSA jurisdictions. It should also be noted that no equivalent restriction is placed upon banks that take security under section 178 of the Bank Act on future growing crops.[9]

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[4] *American Employers Insurance Co.* v. *American Security Bank, N.A.*, 747 F. 2d 1493, 39 U.C.C. Rep. 1087 (D.C. Cir. 1984).

[5] *McArthur* v. *Niles Limited* (1919), 48 D.L.R. 452, at 459, per Middleton, J. (Ont. App. Div.).

[6] R.S.S. 1978, c. B-1; repealed 1979-80, c.13, s.2.

[7] *Ibid.*, s. 20(1).

[8] *Ibid.*, s. 20(3).

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9. S.C. 1980-81-82-83, c. 40, ss. 178(1)(c), 178(2).

FUTURE ADVANCES

14.-(1) A security interest may secure future advances whether or not the advances are given pursuant to an obligation in the security agreement.

(2) No obligation to make future advances is binding on a secured party if the collateral has been seized, attached or charged under circumstances described in clause 20(1)(b) or (c), and the secured party receives notice of this fact.

Definitional Cross References:

"collateral" - s. 2(f)
"future advance" - s.2(r)
"notice" - s.67(3)
"secured party" - s.2(kk)
"security interest" - s.2(nn)

1. Scope
2. The Need for a Future Advances Clause

1. Scope

Under the common law a legal mortgagee making a further advance without notice that the debtor had granted a second mortgage was entitled to tack that advance to the original loan. However, if the first mortgagee had notice of the intervening mortgage, he was not entitled to tack that advance in priority to the intervening mortgage even if he was under a contractual obligation to make the advance.[1] Instead, the first mortgagee was released from the obligation to make a further advance as soon as he received notice of the intervening interest.[2]

The Act modifies the common law in this respect. Section 14 upholds the efficacy of clauses in security agreements that provide for future advances over the life of the agreement. The priority that such future advances will enjoy is not addressed in section 14. Section 35(4) provides that the secured party will be entitled to tack future advances in priority to an intervening security interest so long as his security interest is perfected. Section 20(2) provides that he may tack future advances in priority to an intervening execution creditor who has seized the collateral (or a trustee in bankruptcy) only if the advance was made without notice of the intervening interest, or to the extent that the amount sought to be tacked constitutes reasonable expenses incurred by the secured party for the preservation of the collateral. Section 14(2) can be better understood in light of this provision. There are two consequences of a secured party receiving notice of an intervening execution creditor who has seized the collateral: under section 20(2) the interest of the secured party, to the extent that it secures future advances, is subordinate to the interest of the execution creditor, and under section 14(2) the secured creditor is released from his obligation to make a future advance.

This leaves an unanswered question. What is the outcome when the intervening party is neither a secured party, nor an execution creditor who has seized the collateral? What if he is instead a transferee of the collateral? The Act does not provide an express priority rule in this case. It has been suggested in the American context that each advance creates an independent security interest that attaches the moment the advance is made.[3] It might be argued that an intervening transferee would on this basis take subject to the earlier advance, but would have priority over the subsequent advance. The better view is that the Act is premised upon the idea of a single security interest, and that section 20(2) provides the only exception to the rule that the future advance should have the same priority as the original loan. This view is supported by section 14(2). If it were the intention that intervening transferees should have priority over a secured party's future advances, surely section 14(2) would have provided that a secured party was released from an obligation to make future advances upon the intervention of a transferee. This is not to suggest that mere registration without perfection before the transferee acquires his interest is sufficient to give priority to the secured party. In order to avoid subordination, the secured party must have a perfected security interest at the time the transferee acquires his interest. But if the secured party has such a perfected security interest, any future advances that he makes will enjoy the same priority as the original loan over the interest of the transferee.

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[1] *Hopkinson* v. *Rolt* (1861), 9 H.L. Cas. 514.

[2] *West* v. *Williams*, [1899] 1 Ch. 132.

2. The Need for a Future Advances Clause

It is open to the secured party and the debtor to create a security interest that secures a single, fixed obligation. Or they may agree to a security interest that secures future advances. Section 14(1) does not permit a secured party to tack future advances if the security agreement secures only a single obligation. Rather, the section merely validates the use of future advances clauses in security agreements. The clause may set a ceiling for future advances, or specify that only certain types of advances are within the ambit of the clause. In such a case, the secured party will be bound by the agreement and his security interest will not secure advances falling outside the clause unless he convinces the debtor to agree to amend the security agreement or enter into a second security agreement which covers such advances. It is not a formal requirement that the future advances clause be in writing, but realistically the secured party is likely to have difficulty in convincing a court that there was an oral agreement to that effect or that such a term ought to be implied.

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[3] Coogan, "Intangibles as Collateral Under Uniform Commercial Code" (1964), 77 *Harv. Law Rev.* 997, at 1019 *et seq.* But see contra G. Gilmore, *Security Interests in Personal Property* (1965), Vol. 2, at 933-939.

There is a tendency in the U.S. case law to construe future advances clauses strictly.[4] Future advances clauses using open-ended language that covers "all future indebtedness" is construed to mean all future indebtedness "of the same class as the primary obligation secured by the instrument and so related to it that the consent of the debtor to its inclusion may be inferred".[5]

This approach has been used in the context of secured consumer loan transactions. Suppose that a person obtains a consumer loan from a bank in order to purchase an automobile for personal use. A security interest is taken in the automobile, and the security agreement contains a future advances clause covering "all future indebtedness". The debtor later goes to the same bank and obtains an operating loan for his business and grants a security interest in all his inventory to secure it. It would likely come as a great surprise to the debtor to discover that the secured party is proceeding against his automobile in the event of a default under the operating loan agreement. In some U.S. jurisdictions, the future advances clause in the consumer loan security agreement would be construed as covering only future indebtedness of a person, family or household nature, and not future indebtedness of a business or commercial nature.

It is important not to confuse the need for a future advances provision with the priority structure of the Act. Suppose a secured party takes a security interest in certain collateral but the security agreement does not cover future advances. Assume also that the security interest is properly registered. Clearly the secured party, without more, cannot tack future advances to the security interest. The creditor is merely an unsecured creditor in respect of those later advances. But the secured party may at some time after the creation of third party rights in the collateral enter into an agreement with the debtor in which the original security agreement is amended or a new security agreement is entered into which covers the advances. This is not a question of future advances at all. Rather, it is a case of two separate security interests, each of which is subject to the usual priority rules.

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[4] See, for example, *In re Johnson*, 31 U.C.C. Rep. 291 (M.D. Tenn. (Bankr.) 1981) and the cases cited therein. And see Gilmore, *supra*, footnote 3, at 917-921.

[5] *In re Johnson*, *ibid.*, at 293.

If the intervening party is a secured creditor, the dispute will generally be resolved on the basis of section 35. The secured party who first registered or perfected will be entitled to priority. There can be no objection that a financing statement covers more than one security agreement.[6] The situation is different where the intervening party is not a secured party, since priority will not be governed by section 35. It would follow that any other party who took an interest in the collateral would take priority over the subsequent security agreement or the amendment to the original security agreement. The subsequent agreement between the debtor and the secured party creates a separate security interest that attaches after the interest of the intervening party has come into existence.

An unresolved question remains. Suppose that money is advanced under a security agreement that contains a future advances clause, but that this money is repaid. Does the security interest unattach so that intervening parties (other than secured parties) will take priority over a subsequent advance made pursuant to the future advances clause in the security agreement? The answer may well depend upon the type of security agreement entered into. If the security agreement secures an operating loan account which constantly fluctuates, a zero balance should not terminate the security interest unless it was the parties' intention to close out the agreement.[7] If, however, the security agreement covers a one-shot consumer loan, and a future advances clause is included more out of caution than anything else, a zero balance on the loan account will likely terminate the security interest. In such a case, a fresh security agreement will have to be entered into.

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6. *Borg-Warner Acceptance Canada Ltd.* v. *Federal Business Development Bank*, [1987] 1 W.W.R. 744, 52 Sask. R. 81 (Sask. C. A.).

7. An objection may be raised that the security interest must have terminated because the prerequisites of attachment are no longer satisfied. Perhaps the answer to this is that by keeping the operating loan account open there is sufficient "value" to support a simple contract, so that the requirements of section 12 are indeed satisfied.

APPLICATION OF SALES LAW

15. Where a seller retains a purchase-money security interest in goods, all sales law including, but without limiting the generality of the foregoing, *The Sale of Goods Act, The Consumer Products Warranties Act and The Agricultural Implements Act*, where applicable, governs the sale, including any disclaimer, limitation or modification of express or implied conditions and warranties.

Definitional Cross References:

"purchase-money security interest" - s.2(gg)

1. Scope
2. Characterization of a Conditional Sales Agreement

1. Scope

A secured instalment purchase contract (a conditional sales contract under the prior law) involves both a sales aspect and a security aspect. Sales law governs the contract of sale between the buyer and the seller. Under such an agreement, the seller will also have a security interest in the goods. The PPSA governs the security aspects of the agreement.

The now repealed Conditional Sales Act[1] was interpreted by the Saskatchewan Court of Appeal[2] as excluding altogether The Sale of Goods Act.[3] The inclusion of section 15 of the Act assures that a similar interpretation will not be taken in respect of the PPSA.

2. Characterization of a Conditional Sales Agreement

The traditional form of conditional sales agreement involved a transfer of possession to the buyer, but a reservation of title and property in the goods sold until their price and credit charges were paid. Under sales law, the agreement was generally characterized as an agreement to sell rather than as a sale.[4] It is an open question whether sales law ought to re- evaluate its characterization of the conditional sales agreement in light of the changes brought about by the PPSA. The Act assimilates the conditional sales agreement with other forms of secured transactions in personal property.[5] There is no difference in treatment under the Act between agreements that reserve title to the seller, and those which involve an immediate sale (transfer of title) but under which the seller reserves or is granted a security interest in the goods.

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[1] R.S.S. 1978, c. C-25; repealed by S.S. 1979-80, c. 16, s.2.

[2] *Kozak* v. *Ford Motor Credit Company of Canada Limited*, [1971] 3 W.W.R. 1.

[3] R.S.S. 1978, c. S-1.

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[4] *Ibid.*, s. 3(4). And see *Hayes* v. *Mayne*, [1927] 4 D.L.R. 1070 (Sask. C.A.).

[5] See section 3(a).

ACCELERATION OF PAYMENT OR PERFORMANCE

16. Where a security agreement provides that the secured party may accelerate payment or performance by the debtor when the secured party deems himself insecure or decides that the collateral is in jeopardy, that provision is to be construed to mean that the secured party has the right to do so only if he has commercially reasonable grounds to believe that the prospect of payment or performance is or is about to be impaired or that the collateral is or is about to be placed in jeopardy.

Definitional Cross References:

"collateral" - s.2(f)
"debtor" - s.2(k)
"secured party" - s.2(kk)
"security agreement" - s.2(mm)

It is common to find in a security agreement a clause under which the secured party claims the right to accelerate the obligation if he deems himself insecure. There was early Saskatchewan authority establishing that the exercise of this right cannot be based upon the fear and worry or possible whims of the secured party; rather, its exercise must be based upon a valid and sound reason, and must be exercised in strict compliance with the agreement.[1]

Section 16 of the Act is a codification of this approach. Deemed insecurity clauses are not prohibited, but are to be construed to mean that the right may be exercised only if the secured party has commercially reasonable grounds to believe that the prospect of payment is impaired or that the collateral is about to be placed in jeopardy. It is not enough that the secured party is acting in good faith (that he actually believes that his rights are impaired or in jeopardy). Section 16 adopts an objective test. There must actually be some evidence upon which a secured party might reasonably base its decision.

The Limitation of Civil Rights Act[2] also contains a provision governing deemed insecurity clauses. Section 17 of that Act provides:

> 17. No chattel mortgage or agreement collateral thereto shall contain a provision the application of which depends merely on the opinion of the mortgagee that a circumstance or state of things exists which affects his security; and any such provision is null, void and of no effect.

This provision goes further than section 16 of the PPSA. Deemed insecurity clauses are prohibited altogether. If section 17 applies, one need not bother with section 16 because the clause is void. There are two situations where section 17 of the LCRA does not apply, but section 16 of the PPSA does. Section 17 applies only to chattel mortgages. Section 70(2) of the PPSA provides that a reference in an Act to a "chattel mortgage" is deemed to be a reference to the corresponding type of security agreement under the PPSA. The term therefore encompasses most security agreements providing for non-possessory interests in goods other than security interests arising under secured instalment sales contracts, which under the PPSA are the closest equivalent to a conditional sales contract. It was possible under pre-PPSA law to secure the purchase price of goods through a chattel mortgage which involved the transfer of title by the buyer back to the seller after it vested in the buyer. But this was not a common practice.

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[1] *Peterson v. Johnston* (1911), 17 W.L.R. 596 (Sask. Dist. Ct.).

[2] R.S.S. 1978, c. L-16.

Section 17 of The Limitation of Civil Rights Act will also not apply where the debtor is a corporation and has in writing agreed that the Act should not apply.[3] Here too section 16 of the PPSA will apply to the deemed insecurity clause.

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[3] *Ibid.*, s. 40(2).

CARE OF COLLATERAL IN POSSESSION OF SECURED PARTY

17.-(1) A secured party shall use reasonable care in the custody and preservation of collateral in his possession, and, unless otherwise agreed, in the case of an instrument, a security or chattel paper, reasonable care includes taking necessary steps to preserve rights against other persons.

(2) Unless otherwise agreed, where collateral is in the secured party's possession:

(a) reasonable expenses, including the cost of insurance and payment of taxes or other charges incurred in the custody and preservation of the collateral, are chargeable to the debtor and are secured by the collateral;

(b) the risk of loss or damage, except where caused by the negligence of the secured party, is on the debtor to

the extent of any deficiency in any insurance coverage;

(c) the secured party may hold as additional security any increase or profits, except money, received from the collateral, and shall apply any money so received, unless remitted to the debtor, immediately upon its receipt in reduction of the obligation secured;

(d) the secured party shall keep the collateral identifiable, but fungible collateral may be commingled.

(3) The secured party may create a security interest in the collateral upon terms that do not impair the debtor's rights under Part V.

(4) A secured party does not lose his security interest for failing to meet any obligations imposed by subsection (1) or (2).

(5) A secured party may use the collateral:

(a) in the manner and to the extent provided in the security agreement;

(b) for the purpose of preserving the collateral or its value; or

(c) pursuant to an order of:

(i) the court before which a question relating to the collateral is being heard; or

(ii) a judge upon application with notice to all persons concerned.

Definitional Cross-References:

"chattel paper" - s.2(e)
"collateral" - s.2(f)
"court" - s.2(i)
"debtor" - s.2(k)
"fungible" - s.2(q)
"instrument" - s.2(u)
"judge" - s.2(x)

"money" - s.2(z)
"obligation secured" - s.2(aa)
"secured party" - s.2(kk), see also s.56(3)
"security" - s.2(ll)
"security agreement" - s.2(mm)
"security interest" - s.2(nn)

1. Scope
2. The Duty of Reasonable Care
3. The Implied Terms
4. Security Interests in Collateral Created by Secured Party
5. Consequences of Non-compliance
6. Use of the Collateral

1. Scope

Section 17 sets out the rights and liabilities of a secured party in respect of collateral that is in his possession. These will apply before default in the case of a possessory security interest (where the collateral is pledged to the secured party) and upon seizure[1] by the secured party in the case of a non-possessory security interest. The relationship between section 17 and other sections may be summarized as follows:

(a) Section 56(8) makes it clear that the rights conferred on the debtor and the duty imposed on the secured party under section 17 cannot be waived or varied by contract, except to the limited extent provided in section 17. Section 56(8) does not, however, prohibit a contractual variation of rights conferred by the secured party. Accordingly, the debtor may demand a term in the security agreement providing that the secured party will not grant a security interest in the collateral under section 17(3).

(b) By virtue of section 56(3), the term "secured party" in section 17 includes a receiver and a receiver-manager.

(c) Under section 56(4) a receiver-manager is relieved from compliance with section 17 when disposing of collateral in the ordinary course of business, unless a court orders otherwise.

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[1] This is made clear by sections 56(5) and (7).

(d) Under section 63, the court has a broad power to enforce compliance with section 17, to give directions to a party regarding the exercise of his rights or discharge of his obligations under section 17, to grant relief from compliance with section 17, or to stay enforcement of rights under section 17.

2. The Duty of Reasonable Care

Section 17(1) imposes a duty of care in respect of collateral in the possession of a secured party. Section 56(8) provides that this duty cannot be waived or varied. Thus, the usual exemption clauses which attempt to absolve a party from the consequences of his own negligence are not enforceable. The precise standard of care that must be met will likely depend upon such factors as the course of dealing between the parties, customs of the trade and the character of the property.

Section 17(1) also provides that, unless otherwise agreed, reasonable care in the case of an instrument, a security or chattel paper includes taking necessary steps to preserve rights against other persons. For example, the pledgee of a promissory note payable to the pledgor will be under a duty to give proper notice of dishonour in order not to discharge indorsers.[2] This duty to preserve rights against third parties, unlike the more general duty to take reasonable care, may be displaced by agreement.

In the United States there is a developing body of case law which considers the question whether this duty to take reasonable care placed an affirmative duty on the part of the secured party to sell pledged securities that are plummeting in value.[3] American courts have generally restricted the duty of care to the custody and preservation of the physical object, and not its market value.[4] The Courts are, however, more inclined to find liability where the secured party negligently fails to convert pledged debentures into common stock.[5]

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[2] Bills of Exchange Act, R.S.C. 1970, c. B-5, s.96.

[3] See generally B. Clark, *The Law of Secured Transactions under the Uniform Commercial Code* (1980), at pp.7-32 to 7-38.

[4] *Tepper* v. *Chase Manhatten Bank N.A.*, 376 So. 2d 35, 27 U.C.C. Rep. 1104 (Fla. App. 1979); *Fidelity Bank & Trust Company of New Jersey* v. *Production Metals Corporation*, 366 F. Supp. 613 (E.D. Pa. 1973).

[5] *Traverse* v. *Liberty Bank & Trust Co.*, 5 U.C.C. Rep. 535 (Mass. Super. 1967); *Reed* v. *Central National Bank of Alva*, 421 F. 2d 113 (10th Cir. 1970).

3. The Implied Terms

Section 17(2) sets out a number of provisions which might best be considered implied terms since they apply unless there is an agreement to the contrary. These provisions may be summarized as follows:

(a) Charge-back expenses: Reasonable expenses incurred in the custody or preservation of collateral, including the cost of insurance and payment of taxes or other charges are chargeable to the debtor under section 17(2)(a). In addition, these expenses may be tacked on to the debt secured by the collateral. Section 20(2) provides that such reasonable expenses will have priority against intervening creditors who cause the collateral to be seized under legal process and the trustee in bankruptcy, even if the secured party has notice of such persons.

(b) Risk of loss: The risk of loss from accidental causes must be borne by the debtor to the extent that it is not covered by insurance under section 17(2)(b). If, however, the loss was due to the secured party's failure to take reasonable care, the loss is placed on the secured party.

(c) Increase of value or profits of collateral: The increase in value such as in value of shares pledged by a debtor to a secured party or profits derived from the collateral may be held as additional security. An exception is made in the case of money, which must be applied against the obligation secured or else remitted to the debtor (as in the case of cash dividends or bond interest payments).

(d) Separation of collateral: The secured party must keep the collateral identifiable, except that fungible goods may be commingled.

4. Security Interests in Collateral Created by Secured Party

Although section 17(3) does not expressly state that it applies only where the secured party is in possession of the goods, its close association with the other subsections in section 17 should confirm that this requirement is to be read into the provision. Section 17(3) in effect creates an implied term in a security agreement under which a secured party in possession of the collateral is authorized by the debtor to create a security interest in the collateral to secure an obligation owed by the secured party. This security interest must, however, be on such terms that do not impair the debtor's rights under Part V. This wording is perhaps unfortunate. Article 9-207(e) provided that "the secured party may repledge the collateral upon terms which do not impair the debtor's right to redeem it". Professor Barkley Clark explains the intent of this provision:[6]

> A repledge that "impairs the right to redeem" is presumably one which is for a larger amount than the original loan or for a later maturity. In either of the two latter cases, the original pledgor would be blocked or delayed in getting his hands on the collateral once he pays off the loan; this would be a violation of s.9-207.

The American provision therefore covered the debtor's right to redeem in the sense of his right to demand return of the collateral upon satisfaction of the obligation secured, and not merely his right to redeem after his default.

Section 17(3) is more limited since it only refers to the debtor's rights under Part V. A secured party will generally not be permitted to grant a security interest in the goods after proceedings are commenced to enforce the security interest under Part V because this will in most cases interfere with the debtor's right to redeem or reinstate.

5. Consequences of Non-compliance

Section 17(4) confirms that the failure to meet the obligations imposed by sections 17(1) and (2) does not result in loss of the security interest. The failure to comply will generally be governed by section 64(2), which permits recovery of damage which was reasonably foreseeable as liable to result from such failure. There is pre-PPSA authority holding that the assessment of damages will differ depending on whether the debtor was in default and the secured party had repossessed the goods, or whether the secured party had a possessory security interest in the collateral where there was no default. In *Canadian Imperial Bank of Commerce* v. *Whitman*[7] the bank caused a loss in value of a herd of cattle that it had repossessed when it removed it from the farm resulting in a loss of its certified disease-free status. The court held that the damages should be based on the difference between the amount obtained and the amount that would have been obtained at a forced sale had its disease-free status been maintained. If, however, the secured party was in possession of the collateral under a possessory security interest and the debtor was not in default, a stronger case could be made for the assessment of damages based on the difference between the "true market value" or "replacement value" and the diminished value caused by the secured party's failure to exercise reasonable care.[8] The latter calculation will generally be more generous than the former. However, it may be that this approach no longer prevails under the PPSA. The standard of conduct prescribed by section 64(1) (commercial reasonableness) applies equally to the obligations of a secured party whether arising before or after default by the debtor.[9]

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[6] Clark, *supra*, footnote 3, at p. 7-43.

[7] (1984), 12 D.L.R. (4th) 326 (N.S. App. Div.).

The loss of promissory notes (instruments) pledged to the secured party will not necessarily result in a claim for damages in the face amount of such notes. There is pre-PPSA authority to holding that because the underlying debt is not extinguished, the pledgor still has a right of action against the maker of the note, so that his damages will be limited to his actual loss.[10]

6. Use of the Collateral

Under section 17(5) the secured party is given the right to use the collateral in certain circumstances. The secured party may use the collateral to the extent provided in the security agreement, but in doing so he must use reasonable care as provided in section 17(1). He may also use the collateral where such use is to preserve its value. Finally, the secured party may also use the collateral pursuant to a court order (see section 63). In principle the damages for unauthorized use awarded under section 64(2) should not be restricted to the diminished value resulting from such use, but might better be assessed on the reasonable rental value of the collateral.

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[8] *Liska* v. *Bank of British Columbia*, [1981] 4 W.W.R. 223 (Alta Q.B.).

[9] See *Donnelly* v. *International Harvester Credit Corporation of Canada Ltd.* (1983), 2 P.P.S.A.C. 290 (Ont. Co. Ct.).

[10] *Sterling Bank of Canada* v. *McVety*, [1923] 2 W.W.R. 1 (Sask. C.A.).

REQUEST BY DEBTOR OR INTERESTED PARTY FOR INFORMATION

18.-(1) A debtor, creditor, sheriff or person with a legal or equitable interest in the collateral may, by a demand in writing, containing an address for reply and served on the secured party, require the secured party to send or deliver to him at the address for reply:

(a) a statement in writing of the amount of the indebtedness and the terms of payment thereof as of the date specified in the demand;

(b) a written approval or correction of the itemized list of the collateral attached to the demand as of the date specified in the demand;

(c) a written approval or correction of the amount of indebtedness and of the terms of payment thereof as of the date specified in the demand;

(d) a copy of the security agreement and amendments thereto.

(2) The demand mentioned in subsection (1) may be served in accordance with subsection 67(1) or by registered mail addressed to the post office address of the secured party as it appears on the security agreement or financing statement.

(3) Where a demand is served in accordance with clause (1)(b) and where the secured party claims a security interest in all of a particular type of collateral in which the debtor has rights, he may so indicate in lieu of approving or correcting the itemized list of such collateral.

(4) The secured party shall reply to a demand served under subsection (1) within 10 days after it is served and if, without reasonable excuse, he fails to do so or his answer is incomplete or incorrect, the person who has served the demand is entitled, in addition to any other remedy provided by this Act, to apply to a judge for an order requiring the secured party to comply with the demand.

(5) Where a secured party fails to comply with an order granted under subsection (4), a judge, on application of

the party who obtained the order, may:

(a) declare the security interest of the secured party void and order registration of the security interest removed from the registry; or

(b) make any order that he considers necessary to ensure compliance with the order granted under subsection (4).

(6) Where the person served with a demand under subsection (1) no longer has an interest in the obligation or collateral, he shall, within 10 days after it is served, disclose the name and address of any successor in interest known to him, and if, without reasonable excuse, he fails to do so or his reply is incomplete or incorrect, the person who has served the demand is entitled to the same remedies as provided in subsections (4) and (5).

(7) A successor in interest is deemed to be the secured party for the purposes of this section when he is served with a demand under subsection (1).

(8) Upon application of the secured party or in an application under subsection (4), a judge may:

(a) make any order that is reasonable and just, including an order exempting the secured party in whole or in part from complying with the demand, if the judge is satisfied that the person giving the demand, not being the debtor, is acting in bad faith and is seeking the information for other than ordinary commercial purposes; and

(b) make any order as to costs that he considers fair and reasonable.

(9) The secured party may require payment in advance of the charges prescribed for each reply to a demand under subsection (1), but the debtor is entitled to a reply without charge once every six months.

(10)The secured party is not required to provide a copy of any document registered in the registry.

Definitional Cross-References:

"collateral" - s.2(f)
"creditor" - s.2(j)
"debtor" - s.2(k)
"indebtedness" - s.2(t)
"judge" - s.2(x)
"person" - s. 2(cc)
"prescribed" - s.2(dd)
"secured party" - s.2(kk)
"security agreement" - s.2(mm)
"security interest" - s.2(nn)

1. Purpose
2. Demand for Information
3. Form of Disclosure
4. Consequences of Non-compliance

1. Purpose

Section 18 contains a vital link with the registry system created by Part IV of the Act. The system provides for the registration of a financing statement rather than a copy of the security agreement. Only a limited amount of information is contained on the financing statement: enough to put a searching party on notice that another party may be claiming a security interest in the collateral. Details of the security agreement such as the particular items of collateral secured, the amount of the indebtedness and the terms of repayment are not in the public record. This information must be obtained directly from the secured party. Section 18 provides a mechanism by which this may be accomplished.

2. Demand for Information

Section 18(1) provides that a debtor, a creditor of the debtor, a sheriff or a person with a legal or equitable interest in the collateral may demand from the secured party information concerning a security agreement between him and the debtor. He may also demand a copy of a security agreement. A potential credit grantor who has not yet advanced any money to the debtor (so as to qualify as a creditor), or who does not have an attached security interest in the collateral described in the financing statement (so as to qualify as a person with an interest in the collateral) does not have the right to apply directly under section 18. He may, however, obtain this information by requiring the prospective debtor to make such a request and give the address of the prospective creditor as the address for reply. In this way he will ensure that the information is obtained directly from the secured party, and is not diverted through the hands of the debtor.

It is not essential that a potential secured party go through the formal mechanism set out in section 18. The party may simply request such information directly from the secured party, who may choose to voluntarily disclose such information. If, however, the secured party fails or refuses to do so, section 18 provides a method compelling disclosure.

In *Spir-L-OK Industries* v. *Bank of Montreal*[1] the Saskatchewan Queen's Bench held that a secured party making a demand under section 18 is not entitled to receive copies of all security agreements; he is entitled only to security agreements covering the same collateral in which the secured party making the inquiry has an interest. This conclusion is not supported by the wording of section 18(1). A secured party is nevertheless a creditor, and creditors are given the right to obtain copies of all security agreements. Unsecured creditors are given this right so that they can determine whether to proceed with judgment enforcement measures, and if so, what property they should proceed against. Secured creditors should be treated similarly. The collateral in which they have taken a security interest may not be sufficient to fully secure the debt with the result that the secured party may be forced to proceed as an unsecured creditor in respect of the deficiency.

3. Form of Disclosure

The party making the demand is entitled to receive a copy of the security agreement and any amendments, a statement of the terms of payment and the amount of the indebtedness at the date specified by the inquiring party. In addition, the inquiring party is entitled to a written approval or correction of an itemized list of collateral. In other words, the inquiring party may itemize a list of collateral and send it with the demand. The secured party must then indicate whether or not he has a security interest in any or all of the items identified on the list. Under section 18(3) the secured creditor may indicate that he has a security interest in all of a particular kind of collateral in lieu of approving or correcting the itemized list.

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[1] (1985), 41 Sask. R. 128 (Q.B.).

The party making the inquiry must keep in mind the priority structure of the Act in considering the uses to which such information may be put. If a secured party has registered a financing statement describing the collateral as "farm implements" but the demand reveals that the secured party only has a security interest in a tractor thereby indicating that the remainder of the farm implements are unencumbered, the inquiring party must not assume that it is safe to take a security interest in the unencumbered assets. Because the priority system generally gives priority to the first to register,[2] the secured party may at some future date refinance or enter into a new security agreement in which the other farm implements are taken as collateral. This security interest would have priority over the intervening security interest because of the earlier registration. Similarly, the inquiring party should not assume that it is safe to take a security interest in the collateral if he discovers that the obligation secured by the secured party is nearly satisfied. The secured party may make a subsequent advance,[3] or refinance, or enter into a fresh security agreement in which the same collateral is given as security. Again, priority will generally be determined by the first to register.

There are measures available to a potential secured party who discovers that the collateral offered by the debtor as security is within the collateral description of a financing statement. One measure is to seek a subordination agreement from the secured party. Another is to request that the secured party register a financing change statement that amends the collateral description in his registration so as to confine it to the items of collateral in which the secured party has a security interest. If the secured party refuses to co-operate, the potential secured party could respond by having the debtor invoke his rights under sections 50(3) and (4) or by entering into a security agreement with the debtor that provides for a security interest in the collateral, thereby giving him the right to invoke sections 50(3) and (4).

If the secured party no longer has an interest in the obligation or collateral, he is required under section 18(6) to disclose the name and address of any successor known to him upon being served with a demand. Under section 18(2) a successor in interest is considered to be a secured party upon being served with a demand.

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[2] Section 35.

[3] See ss. 14 and 35(4).

4. Consequences of Non-compliance

There is nothing in section 18 or in any other section of the Act that provides that a secured party is bound by the responses he gives to a demand for information under section 18. While he would be liable for any loss for incorrect information provided to an inquiring party,[4] there is good reason to believe that the Legislature intended (without expressly so stating) that a secured party is also estopped from denying the accuracy of the information he supplies in response to a demand made under section 18. The notice registration system, of which section 18 is a central feature, replaced document filing systems under which true copies of security agreements had to be put on public record. A notice registration system does not entail public disclosure of security agreements; the method it provides for disclosing the relationship between secured parties and debtors must be at least as efficacious as the system it replaced if it is to facilitate modern financing. Persons who demand information under section 18 need accurate information in order to properly conduct business relations. A damage action against a secured party who provides inaccurate information is not an adequate substitute. If a secured party is estopped from disputing the accuracy of the information he supplies in response to a demand under section 18, the person to whom the information was given will be less at risk when relying upon such information. Because the efficacy of the system would be greatly enhanced by the application of the estoppel principle in this context, there is every reason to believe that it is one of the principles of the common law that should be introduced through section 64(5).

Section 18 also provides a mechanism that will force compliance where a secured party fails to comply with a demand for information. The inquiring party may seek a court order requiring compliance. If the secured party fails to comply with such an order, a judge may declare the security interest void or make any order necessary to ensure compliance.

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[4] Section 64(2).

TIME OF PERFECTION

19. A security interest is perfected when:

(a) it has attached; and

(b) all steps required for perfection under this Act have been completed;

regardless of the order of occurrence.

Definitional Cross-References:

"security interest" - s. 2(nn)

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1. Scope
2. Methods of Perfection

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1. Scope

Section 19 sets out the two conditions that must be satisfied before a security interest is perfected. First, the security interest must have attached: i.e., it must have come into existence under section 12. Secondly, the secured party must have taken steps to perfect the security interest.

In general, attachment will ensure that the security interest is enforceable against the debtor (see section 12), while perfection will protect the security interest against competing third party claims. An unperfected security interest is particularly susceptible to subordination to other security interests and to the interests of creditors who cause the collateral to be seized under legal process, buyers without notice, and the debtor's trustee in bankruptcy. See section 20(1). In fact, the term originated from American bankruptcy law: "perfection" denoted the ability to withstand an attack by unsecured creditors and the debtor's trustee in bankruptcy.

Even so, perfection does not guarantee that a security interest will enjoy first priority. The trustee in bankruptcy and creditors are entitled to a limited priority over a security interest in the case of subsequent advances. See section 20(2). Ordinary course buyers generally take free of a perfected security interest granted by the seller. See section 30. A perfected security interest can be subordinated to other perfected security interests. For example, under section 35 a security interest may be first perfected but may have second priority to a security interest that was registered first, but perfected later.

Section 19 also makes it clear that perfection arises at the moment of attachment and the completion of the perfection step. The order of occurrence of attachment and completion of the perfection step is not important. The step for perfection may be taken first, as in the case where a financing statement is registered first and later a security agreement is signed creating a security interest in the debtor's property. In such a case the security interest is perfected as soon as it attaches. Or attachment may occur first followed by a perfection step, as in the case where a non-possessory security interest is created, but is not registered until a later time. In such a case, perfection is delayed until the financing statement is registered.

2. Methods of Perfection

There are three methods of perfection:

(1) perfection by possession

(2) perfection by registration

(3) temporary perfection.

Security interests in all forms of collateral may be perfected by registration under section 25. Only certain categories of collateral may be perfected by possession under section 24. A security interest may be temporarily perfected without registration or possession in certain situations. See sections 5(2), 7(3), 26, 28(3), 29(5), 49(1) and (2); see also sections 21 and 34(1).

SUBORDINATION OF SECURITY INTERESTS

20.-(1) An unperfected security interest is subordinate to the interest of:

(a) a person who has a perfected security interest or who is otherwise entitled to priority under this Act;

(b) a person who causes the collateral to be seized under legal process, including execution, attachment or garnishment, or that obtains a charging order or equitable execution affecting the collateral;

(c) a sheriff who has seized or has obtained a right to the collateral under *The Creditors' Relief Act*;

(d) a representative of creditors, but only for the purposes of enforcing the rights of persons mentioned in clause (b), and a trustee in bankruptcy;

(e) a transferee who is not a secured party and who acquires his interest for value without notice of the security interest and before it is perfected:

(i) in documents of title, securities, instruments or goods, where the transferee receives delivery of the collateral;

(ii) in intangibles other than accounts;

(iii)in accounts acquired through a transaction not otherwise governed by this Act;

(iv)in chattel paper acquired through a transaction not otherwise governed by this Act, where the transferee receives possession of the chattel paper.

(2) A perfected security interest is subordinate to the rights of persons mentioned in clauses (1)(b) to (d), except to the extent that the security interest secures:

(a) advances made before the interests of such persons arise;

(b) advances made before the secured party receives

notice of the interest of such persons;

(c) reasonable costs incurred and expenses made by the secured party for the protection, maintenance, preservation or repair of the collateral.

Definitional Cross-References:

"account" - s.2(b)
"chattel paper" - s.2(e)
"collateral" - s.2(f)
"document of title" - s.2(m)
"goods" - s.2(s)
"instrument" - s.2(u)
"intangible" - s.2(v)
"notice" - s.67(3)
"person" - s.2(cc)
"secured party" - s.2(kk)
"security" - s. 2(11)
"security interest" - s.2(nn)
"value" - s.2(qq)

1. Scope
2. Interests Having Priority over an Unperfected Security Interest
3. Interests Having Priority over a Perfected Security Interest

1. Scope

Section 20(1) sets out the priority of conflicting interests where one of the interests is a security interest that has attached, but has not been perfected. Section 20(1) renders an unperfected security interest subordinate to four classes of persons:

(a) a person who has a perfected security interest, or other person entitled to priority under the Act;

(b) a person who has caused the collateral to be seized under legal process, including a sheriff and a representative of creditors;

(c) a trustee in bankruptcy;

(d) certain transferees of the collateral.

In addition, section 20(2) provides that a perfected security interest is subordinate in specified circumstances to the interests of unsecured creditors and their representatives.

Two points should be kept in mind. First, the subordination in section 20 operates only in competitions between the unperfected security interest and third party claimants: an unperfected security interest remains valid and enforceable against the debtor. Second, section 20(1) must be read in light of section 12. Where a transferee or creditor obtains an interest in the personal property before the security interest attaches, the competition will not be governed by section 20. The security interest will attach only to the interest, if any, that the debtor has at the time of attachment. The transferee or creditor in such a case will generally be entitled to priority.[1] Section 20(1) governs the case where there is an attached but unperfected security interest followed by the creation of a third party interest in the collateral.

2. Interests Having Priority over an Unperfected Security Interest

(a) Perfected security interests and others entitled to priority: Section 20(1)(a) provides that an unperfected security interest is subordinate to a perfected security interest. Where both security interests are unperfected, priority goes to the first security interest to attach. See section 35(1).

(b) Unsecured creditors, the sheriff and representatives of creditors: Under section 20(1)(b) an unperfected security interest is subordinate to the rights of unsecured creditors who have seized the collateral. It is necessary to determine at what stage in the judgment enforcement proceedings will the unsecured creditor have caused "the collateral to be seized under legal process" so as to fall within section 20(1)(b). In the case of post-judgment seizure of personal property under a writ of execution, the executions law provides the rules for determining when property has been seized. Goods are not "seized" merely because they are bound by the delivery of a writ of execution to the sheriff.[2] In order for the goods to be seized the sheriff must take steps to effect the seizure.[3] Seizure of accounts involves notice to the account debtor.[4]

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[1] See the commentary accompanying section 12.

[2] *Dodd* v. *Vail* (1913), 3 W.W.R. 796 (Sask. S.C.).

Section 2.2 of The Executions Act[5] supplements section 20(1) where the judgment enforcement measure is in the form of a writ of execution. Section 2.2 provides:

> 2.2 Every writ of execution issued against goods on or after the coming into force of *The Personal Property Security Act*, binds, from the time of its delivery to the sheriff to be executed, all the goods of the judgment debtor within the province, and, if it is registered, takes priority over a security interest which has not been registered or which is registered after the writ of execution is registered, but does not take priority over:
>
> (a) a *bona fide* sale by the judgment debtor, accompanied by immediate delivery and an actual and continued change of possession of the goods sold, without actual knowledge to the purchaser that a writ is in the hands of the sheriff or that a seizure has been made;
>
> (b) the interests of a secured party who has taken possession of the goods before the writ of execution is registered;
>
> (c) the interests of a secured party who has taken a purchase-money security interest that is perfected pursuant to *The Personal Property Security Act* before or within fifteen days after the debtor obtains possession of the goods, whether perfected before or after registration of the writ of execution.

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[3] *Attorney-General for Ontario and Royal Bank of Canada*, [1970] 2 O.R. 467 (Ont. C.A.).

[4] R.S.S. 1978, c. E-12, s.5(2).

[5] R.S.S. 1978, c. E-12, as amended S.S. 1978-80. c.24, s.3.

Section 2.2 provides for the registration of writs of execution in the Personal Property Registry. Priority disputes are generally governed by a first in time rule of priority. Section 2.2(c) merely parallels section 21 of the Act by providing that a subsequent unperfected purchase-money security interest is entitled to priority over a registered writ of execution if it is perfected within fifteen days of the debtor obtaining possession of the goods. If the writ of execution is not registered, then the unsecured creditor must fall back to the general rule in section 20(1)(b). He will be entitled to priority only if the security interest is unperfected at the time the collateral is actually seized.

In the case of a garnishment, the property is considered seized upon service of the garnishee summons (rather than upon payment into court), since section 5(1) of The Attachment of Debts Act provides that service of the summons binds any debt due or accruing due.[6] While a receivership order operates *in personam* and does not involve seizure of the property to which it relates, the wording of section 20(1)(b) indicates that it is the obtaining of an order appointing a receiver, rather than his taking possession of the property, that is relevant. The rationale for protecting unsecured creditors is that they have been put to the expense of obtaining judgment enforcement measures.[7] Upon serving the garnishee summons or obtaining the appointment of an equitable receiver the creditor has done all that he can be expected to do, and he is therefore given priority by section 20(1)(b).

Section 20(1)(c) covers a sheriff who has seized or who has obtained a right to the collateral under The Creditors Relief Act.[8] A sheriff has no independent right to seize property and must always act under the authority of a writ of execution.

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6. R.S.S. 1978, c. A-32. See also *Russelsteel Inc.* v. *Lux Services Ltd.* (1986), 46 Sask. R. 168 (Q.B.).

7. J.S. Ziegel and R.C.C. Cuming, "The Modernization of Canadian Personal Property Security Law" (1981), 31 *U. of Toronto Law J.* 249, at 274.

8. R.S.S. 1978, c. C-46.

However, under The Creditors' Relief Act, a sheriff is empowered to make seizures without having to show that he is acting for any one of the creditors who has delivered a writ or certificate to him.[9] Section 20(1)(c) of the PPSA gives a sheriff who has seized the collateral pursuant to the powers granted in The Creditors' Relief Act priority over an unperfected security interest. The benefit of this priority accrues to the unsecured creditors of the debtor.

Under section 31 of The Creditors' Relief Act, a sheriff may obtain an order requiring that the funds in court belonging to the debtor be paid out to him so that they can be applied to unsatisfied judgments of the debtor. Once the order has been obtained, the sheriff has "obtained a right to the collateral" within the meaning of section 20(1)(c).

Section 20(1)(d) applies to a "representative of creditors". A common law assignee for the benefit of creditors or a trustee under a Bankruptcy Act proposal[10] would fall into this category. Unlike the trustee in bankruptcy, the representative does not have an independent status under the section. He can assert only the priority that the creditor he represents could have asserted. The reason for the distinction between the position of the trustee and that of a representative is that generally an assignment or proposal is for the benefit of the debtor, whereas bankruptcy generally benefits creditors as well.[11] A person acting primarily in the interests of the debtor should not be able to subordinate an unperfected security interest unless in doing so he is exercising the rights of creditors he represents.

(c) Trustee in bankruptcy: The trustee in bankruptcy is given an independent status to assert priority over unperfected security interests. In other words, the trustee's ability to subordinate unperfected security interests is independent of the right of the creditors he represents to do so. The trustee in bankruptcy need not establish that any of the creditors could have subordinated the security interest under section 20(1)(b).

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[9] R.S.S. 1978, c. C-46, ss.20(4), 40.

[10] Bankruptcy Act, R.S.C. 1970, c. B-3, ss.32-46.

[11] *Re Mercantile Steel Products Ltd.* (1978), 20 O.R. (2d) 237 (Ont. S.C.).

Section 50(4) of The Bankruptcy Act deems the bankruptcy to have relation back to and commence at the date of the filing of a petition on which a receiving order is made or of the filing of an assignment with the official receiver. Thus, if the security interest is unperfected at the date of such filing, the trustee in bankruptcy may claim priority over the security interest.

Less common is the case where a security interest is perfected when the interest of the trustee in bankruptcy comes into existence, but there is a subsequent lapse in perfection prior to repossession by the secured party. Does the subsequent unperfection of the security interest result in its subordination under section 20(1)(b), or is perfection to be determined at the moment the trustee in bankruptcy (or seizing creditor) obtains his interest? A literal reading of the Act might suggest the former, since in section 20(1)(e) the point is expressly made that the perfection is at the date the transferee acquires his interest, whereas sections 20(1)(a) to (d) do not specify when the perfection is to be determined. However, the Saskatchewan Court of Appeal preferred the latter view in *Central Refrigeration & Restaurant Services Inc.* v. *Canadian Imperial Bank of Commerce.*[12] The bankruptcy occurred within the 15 day period of temporary perfection in section 28(3) but was not thereafter perfected by registration or perfection. The subsequent failure to perfect did not result in the subordination of the security interest under section 20(1)(d). If the security interest is perfected at the time of bankruptcy, that will suffice. The same reasoning does not apply to the temporary perfection rule in section 5(2)(b), since the temporary perfection is not automatic but is conditional upon the security interest being perfected within the time period specified in that section.[13] Nor does *Central Refrigeration* extend to temporary perfection under section 7(3) or the superpriority rule in section 21, because these sections do not apply unless there has been perfection or registration within the specified period. The drafting of section 28(3) is different. The security interest in proceeds is continuously perfected, but after 15 days becomes unperfected. Hence, the different result in the two cases.[14]

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[12] (1986), 47 Sask. R. 124.

[13] See *Royal Bank of Canada* v. *Deloitte, Haskins & Sells Ltd.*, [1987] 1 W.W.R. 140, 50 Sask. R. 297 (Sask. Q.B.).

In a number of Saskatchewan cases it was held that a trustee in bankruptcy could not claim priority over an unperfected deemed security interest in the form of a lease.[15] It was argued that because the trustee in bankruptcy steps into the shoes of the bankrupt debtor, he obtains only the limited possessory interest of a lessee. The Court of Appeal in *International Harvester Credit Corporation of Canada Limited* v. *Touche Ross Limited*[16] rejected this contention. The court pointed out that the trustee was not merely a receiver of the bankrupt's property, but a representative of creditors who could assert the creditor's rights. The Court held that all unperfected security interests were subordinate to the trustee in bankruptcy regardless of whether the interest was "proprietary" or "possessory".[17]

In one exceptional case the trustee in bankruptcy may not be entitled to priority over an unperfected security interest. The debtor's property subject to provincial exemptions does not form part of the bankrupt's estate so that the trustee in bankruptcy will not have any interest in such property. Thus, it can be argued that an unperfected purchase money security interest[18] in exempt property will not be subordinate to the trustee in bankruptcy.[19] However, one

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[14] The temporary perfection periods in sections 26(1), 26(2) and 29(5) are similar to section 28(3): the security interest is automatically perfected during the grace period, and thereafter becomes unperfected.

[15] *Ford Credit Canada Limited* v. *Percival Mercury Sales Ltd.*, [1984] 5 W.W.R. 714 (Sask. Q.B.); *International Harvester Credit Corporation of Canada Limited* v. *Bell's Dairy Ltd.* (1984), 35 Sask. R. 187; *Farm-Rite Equipment Ltd.* v. *Robinson Alamo Sales Ltd.* (1985), 46 Sask. R. 175 (Q.B.).

[16] [1986] 6 W.W.R. 161, 50 Sask. R. 177 (Sask. C.A.).

[17] *Ibid.*, at 171 (W.W.R.), 184 (Sask. R.).

[18] The Exemptions Act, R.S.S. 1978, c. E-14, s.3(1) extends the exemption to seizures by secured creditors. However, by virtue of s.5(2) a secured creditor claiming a purchase money security interest is not subject to the exemptions. The same is true of trailers. Under s.2(1)12 they are exempt from seizure; however, section 3(1), which extends the exemption to seizures under security agreements, relates to personal property described in paragraphs 7 to 11 of s.2(1).

[19] See *Re Beaton* (1979), 101 D.L.R. (3d) 338, at 352, per Arnup J. (Ont. C.A.).

Saskatchewan Court has rejected this contention. In *Royal Bank of Canada* v. *Deymen* [20] Mr. Justice McIntyre held that the trustee in bankruptcy could seize the exempt property (taking advantage of s.20(1)(d) it could claim the secured creditor's exception from the exemption) and the proceeds would be distributed amongst all the unsecured creditors under the Bankruptcy Act.

It should also be noted that the constitutionality of provincial legislation which confers additional rights to the trustee in bankruptcy has been questioned by one commentator.[21]

(d) Transferees: Section 20(1)(e) subordinates an unperfected security interest to transferees who are not secured parties. The transferee will be able to claim priority only if he acquired his interest "for value and without notice of the security interest and before it is perfected". These conditions are to be tested at the moment the transfer occurs. The transferee must be without notice when he acquires his interest. If a transferee of goods discovers the existence of the unperfected security interest after he acquires his interest in the goods but before he receives delivery of them, he will nevertheless be entitled to priority over an unperfected security interest. Similarly, perfection of the security interest is to be determined at the time the transferee acquires his interest. If the security interest is perfected at the time of the acquisition of the interest by the transferee, but some time thereafter it becomes unperfected, the transferee will be unable to claim under section 20(1)(e).

The case of *Bank of Montreal* v. *Kalatzis*[22] raises a difficult point of first impression. In that case, Kalatzis granted a security interest in a Grand Prix automobile to the Bank of Montreal, which was duly registered by debtor name and serial number. Kalatzis later traded in the vehicle to Mid-

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[20] (1986), 53 Sask. R. 224 (Q.B.).

[21] A. Peltomaa "Constitutional Validity of Provincial Legislation Subordinating Unperfected Security Interests to Trustees in Bankruptcy" (1982), 42 C.B.R. (N.S.) 104. And see *Paccar Financial Services Ltd.* v. *Touche Ross Limited* (Q.B. No. 3823, June 25, 1987) in which it was held that section 20(1)(d) is imperative to the extent that it gives the trustee in bankruptcy priority over a true lease for a term of more than one year.

[22] (1984), 37 Sask. R. 300 (Q.B.).

West Motors, who took for value without notice. At this point the Bank was entitled to priority over Mid-West, since it had a perfected security interest in the vehicle. However, the registration period of the bank's security interest subsequently expired, and the bank's security interest became unperfected. Then, Mid-West sold the Grand Prix to Grant, at a time when no security interest was registered against the vehicle.

The bank did not claim against Grant, but rather claimed from Mid-West a portion of the cash proceeds paid by Grant. The court rightly held that by virtue of section 28(1)(b) the security interest extends to the proceeds, and that the lack of perfection did not affect its priority vis-a-vis Mid-West. The priority of the claim to proceeds was the same as that to the original collateral.

But what if the bank had decided to proceed against Grant? Does section 20(1)(e) apply only to a transferee who takes from the debtor (e.g., Kalatzis to Mid-West), or does it extend to a subsequent transfer by the transferee (e.g., Mid-West to Grant)? Although there are no cases on this point, there is nothing in the wording of section 20 which restricts its application to the initial debtor-transferee transaction. Indeed, it only makes sense to extend its application. In the *Kalatzis* case, the second transferee, Grant, would have found nothing had she made a serial number search. Although it is true that a name search of Mid-West would not have revealed the security interest (since it was Kalatzis rather than Mid-West which had granted it), it is possible that the transferee might seek out the chain of previous owners and search each name individually. Accordingly, the better view is that section 20(1)(e) would apply to subordinate the Bank of Montreal's security interest to Grant's interest in the vehicle. A somewhat similar issue arises in respect of section 35. See the commentary accompanying section 35 for a more detailed discussion of this issue.

There is also some controversy regarding the term "purchaser for value". An Ontario decision[23] held that it is not enough that the purchaser has entered into an agreement under which he promises to give value; rather, the value must be executed (fully paid over to the debtor). A Canadian expert finds some further support for this view on the basis of the interpretation given to this term by the courts of equity (and as well under American negotiable instruments law).[24] But perhaps the better view is that this is not sufficient reason to depart from the meaning of "value" as expressly defined in section 2(qq). It should not make a difference whether he paid in full, paid in part or promised to pay in the future. The transferee should be able to rely upon the Registry.

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[23] *Royal Bank of Canada* v. *Dawson Motors (Guelph) Ltd.* (1981), 39 C.B.R. (N.S.) 304, 1 P.P.S.A.C. 359 (Ont. Co. Ct.).

Where the property in question is documents of title, securities, instruments, goods or chattel paper there is an additional requirement: the transferee must obtain delivery or possession of the property before he is entitled to priority over unperfected security interests. One should keep in mind that other provisions of the Act give certain transferees priority over perfected security interests. For example, section 30(1) gives ordinary course buyers and lessees of goods priority over a perfected security interest.

3. Interests Having Priority over a Perfected Security Interest

Subsection 20(2) provides that advances made by a secured party after he becomes aware that the collateral has been seized or that the debtor has become bankrupt is subordinate to the claim of the seizing creditor or trustee in bankruptcy. An exception is made where the additional obligation incurred is attributable to reasonable costs and expenses made by the secured party for the protection, maintenance, preservation or repair of the collateral.

A registration of a writ of execution in the Personal Property Registry is not sufficient to charge the secured party with knowledge, since section 51 provides that registration of a document in the registry is not constructive notice.

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[24] J.S. Ziegel, "Royal Bank of Canada v. Dawson Motors (Guelph) Ltd.: A Postscript" (1981-82), 6 *Can. Bus. L.J.* 507.

PRIORITY OF PURCHASE-MONEY SECURITY INTEREST

21. A purchase-money security interest in:

(a) collateral, other than intangibles, that is registered within 15 days after the day the debtor obtains possession of the collateral;

(b) intangibles that is registered within 15 days after the day the security interest attaches;

has priority over the interest of a person mentioned in clauses 20(1)(b) to (d).

Definitional Cross-References:

"collateral" - s.2(f)
"debtor" - s.2(k)
"intangible" - s.2(v)
"purchase-money security interest" - s.2(gg)
"security interest" - s.2(nn)

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1. Scope
2. When Does the Debtor Obtain Possession of Collateral?
3. Non-application to Transferees

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1. Scope

Section 20(1) provides that an unperfected security interest is subordinate to the claimants enumerated in that provision. Section 21 operates as an exception to section 20(1). An unperfected purchase money security interest has priority over the interests of persons mentioned in clauses 20(1)(b) to (d) (seizing creditors and sheriffs, representatives of creditors and the trustee in bankruptcy) if it is perfected within 15 days after the debtor obtains possession of the collateral. In the case of a purchase-money security interest in intangibles (where it is impossible to take possession of the collateral), perfection must take place within 15 days of attachment. The section therefore gives the secured party a short "grace period" within which to perfect his security interest. If the secured party fails to perfect his security interest within this time, he will be subordinate to the parties listed in section 20(1).

Section 21 does not apply to a competition between an unperfected purchase-money security interest and a perfected security interest. However, a similar grace period is provided in section 34 (though the pre-requisites are stricter in the case of a purchase-money security interest in inventory).

2. When Does the Debtor Obtain Possession of Collateral?

The 15 day period referred to in section 21(a) runs from the time that the debtor "obtains possession of the collateral". A problem arises in determining when the debtor's possession begins for the purposes of this section. This is illustrated in the following example: On June 1 a seller delivers a photocopier machine to a prospective buyer on a 30 day "sale or return" basis. On July 1 the customer decides to buy the machine, and on that date a security agreement is entered into. The seller registers on July 15. However, on July 10 an execution creditor seized the photocopier (or registered the writ of execution in the Personal Property Registry).

The execution creditor will argue that the secured party did not perfect its security interest within 15 days of the debtor obtaining possession of the collateral (June 1). The secured party may counter that although the customer was in possession of the goods on June 1, he was not in possession of it as a "debtor" until the security agreement was signed (July 1), so that the perfection was within 15 days. This issue has not yet been raised in Canada. American courts are divided on this question,[1] but the dominant view is that the time period does not run until the sale or lease is consummated.[2]

The 15-day grace period runs from the date the debtor obtains possession; it does not matter that the date the security agreement is entered into or the time of attachment of the security interest occurs more than 15 days before registration. Thus, where the security agreement is signed on March 1, the debtor obtains possession of the goods on April 1, and registration occurs on April 15, the secured party will nevertheless be permitted to take advantage of section 21.

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[1] See B. Clark, *The Law of Secured Transactions under the Uniform Commercial Code* (1980), at 3-64 to 3-66.

[2] *Brodie Hotel Supply, Inc. v. United States* , 431 F.2d 1316 (9th Cir. 1970); *In re Ultra Precision Industries, Inc.*, 503 F.2d 414 (9th Cir. 1974); *Rainer National Bank v. Inland Machinery Co.*, 631 P. 2d 389 (Wash. App. 1981).

3. Non-application to Transferees

The grace period in section 21 does not protect an unperfected purchase- money security interest from a transferee described in section 20(1)(e) who acquires his interest at a time when the security interest was unperfected. This feature of the Act is displayed in the following scenario: A customer of a bank wishes to buy a used truck. On August 1 he negotiates a loan with the bank and signs a security agreement granting to the bank a security interest in the vehicle. He then buys the truck using the loan money obtained from the bank. On August 10 the customer sells and delivers the vehicle to a third party who did not know of the bank's security interest. On August 15, the bank registers a financing statement. The third party transferee is entitled to priority. The grace period in section 21 only applies to the parties listed in sections 20(1)(b) to (d). It does not apply to transferees described in section 20(1)(e). Because section 21 is inapplicable, the transferee has priority over an unperfected security interest by virtue of section 20(1)(e).

SECURITY INTERESTS IN RENTAL PAYMENTS

22. A security interest in rental payments is subordinate to the interest of a person who acquires, without fraud under a transaction to which *The Land Titles Act* applies, an interest in the lease providing for the rental payments.

Definitional Cross-References:

"person" - s.2(cc)
"security interest" - s.2(nn)

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1. Scope
2. What Constitutes "an interest in the lease"?

SECTION 22

1. Scope

Section 22 provides a priority rule that will govern a conflict between an assignee of rental payments and a person who acquires an interest in the lease (i.e., a real property interest) without fraud under a transaction to which The Land Titles Act applies. The reference to "fraud" undoubtedly refers to the test of fraud set out in sections 196 and 213 of The Land Titles Act.[1] Section 22 does not distinguish between an interest in the lease acquired before the assignment of rentals and an interest acquired after the assignment. Both are entitled to priority if they are acquired without fraud.

2. What Constitutes "an interest in the lease"?

When section 22 refers to an interest in a lease, it is referring to the landlord's right of reversion. The following scenario falls within the ambit of section 22: A landlord to whom rents are payable from his tenants assigns the rental payments to a bank to secure a loan. Later, the landlord (who is the registered owner of the land) transfers his reversionary interest to a purchaser, who obtains a transfer of title. The purchaser obtains the landlord's reversionary interest (the entire interest in the lease referred to in section 22) and is therefore entitled to priority.

A mortgage of the landlord's interest in the leased property is not sufficient to give the mortgagee an interest in the lease within the meaning of section 22. In order to have an interest in the lease the mortgagee must establish a landlord and tenant relationship between himself and the tenant of the mortgagor. Prior to the enactment of a Torrens system of land registration the mere granting of a real property mortgage could have this effect.[2] However, since the enactment of The Land Titles Act it has been recognized that the mortgagor remains legal owner of the land until foreclosure or sale.[3]

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[1] R.S.S. 1978, c. L-5. Mere knowledge of the assignment of rentals will likely not constitute fraud: see *Hackworth* v. *Baker*, [1936] 1 W.W.R. 321 (Sask. C.A.). Fraud may, however, be constituted if the transferee knows that the landlord is acting fraudulently in transferring his interest: see *Hermanson* v. *Martin*, [1982] 6 W.W.R. 312 (Sask. Q.B.), aff'd [1987] 1 W.W.R. 439 (Sask. C.A.).

[2] In the case of a lease followed by a mortgage of the landlord's reversion, the mortgagee obtained the landlord's interest. Where there was a mortgage followed by a lease, no such relationship between the mortgagee and the tenant existed unless the tenant attorned to the mortgagee by paying the rent to him. See *Rogers* v. *Humphreys* (1835), 4 A. & A. 299.

[3] *Smith* v. *National Trust Co.* (1912), 1 D.L.R. 698, at 712-13 (S.C.C.).

Accordingly, something more must be done by the mortgagee to create this landlord and tenant relationship. Upon foreclosure or sale of the property the mortgagee or person to whom the land is sold will acquire the landlord's reversionary interest and at that point the landlord and tenant relationship will be constituted.

In *United Dominions Investments Limited* v. *Morguard Trust Company*,[4] the Saskatchewan Court of Appeal held that a contractual term in the mortgage allowing the mortgagee to take possession of the rents and profits was sufficient to give the mortgagee an interest in the lease. Unfortunately the decision of the Court of Appeal is difficult to reconcile with other real property decisions. Section 133 of The Land Titles Act provides:

> 133. Proceedings to enforce payment of moneys secured by mortgage, or to enforce the observance of the covenants, agreements, stipulations or conditions contained in a mortgage, or for sale of the lands mortgaged or to foreclose any estate, interest or claim in or upon the lands mortgaged or to redeem or discharge land from a mortgage, may be had and taken in the Court of Queen's Bench, and the court may authorize the mortgagee to enter into possession of the lands and receive and take the rents, issues and profits thereof, and, whether in or out of possession, to lease the same or any part thereof, provided that any lease or leases so authorized shall not extend in all beyond a period of five years.

Fifty years ago it was generally thought that the antecedent of section 133 provided statutory powers (which also required proceedings to be taken before a court) which could be supplemented with contractual remedies given to the mortgagee in the mortgage document.[5] More recently, however, the accepted view is that section 133 sets out exclusive statutory remedies available to the mortgagee: the mortgagee is unable to rely upon contractual remedies.[6] If this view is accepted as correct, it is difficult to see how the inclusion of the contractual power to collect rents was of any significance in *United Dominions*.

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[4] [1986] 1 W.W.R. 78, 43 Sask. R. 81 (Sask. C. A.).

[5] *Hebert* v. *George*, [1933] 3 W.W.R. 399 (Alta. App. Div.).

[6] *Devlin* v. *Wilson*, [1936] 1 W.W.R. 705 (Sask. K.B.); *Industrial Development Bank* v. *Lees* (1970), 75 W.W.R. 445 (Sask. C.A.). An exception is made where a receiver is appointed; see *Roynat* v. *Denis* (1982), 17 Sask. R. 415 (Sask. C.A.).

It might be argued that an attornment clause in a mortgage is sufficient to constitute a landlord and tenant relationship between the mortgagee and the tenant so as to give the mortgagee an interest in the lease. The validity of attornment clauses is expressly recognized in section 134 of The Land Titles Act. This contention can be easily disposed of. An attornment clause creates a landlord and tenant relationship between the mortgagee and the mortgagor. But what is needed is such a relationship between the mortgagee and the mortgagor's tenant. At best, the relationship between the mortgagee and the tenant is that of a landlord and a sub-tenant, and there is authority to the effect that the landlord has no right to claim rent from the sub-tenant or to distrain against his goods.[7] Accordingly, an attornment clause should not be considered sufficient to give the mortgagee an interest in the lease.

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[7] *Anderson v. Scott* (1912), 3 W.W.R. 609 (Sask. S.C.).

CONTINUITY OF PERFECTION

23.-(1) If a security interest is originally perfected in a way permitted under this Act and is again perfected in some other way under this Act without an intermediate period when it is unperfected, the security interest is deemed to be perfected continuously for the purposes of this Act, and is deemed, for the purposes of section 35, to be continuously perfected in the way in which it was originally perfected.

(2) An assignee of a security interest succeeds insofar as its perfection is concerned to the position of the assignor at the time of the assignment.

Definitional Cross-References:

"security interest" - s.2(nn)

1. Scope
2. Effect of Lapse of Registration

1. Scope

A security interest can be perfected by any one of three methods: registration, possession or temporary perfection. Section 23 confirms that there is no objection to using a combination of two or three different methods of perfection. The section ensures that a change in the method of perfection does not alter an established priority status. For example, suppose that a bank which has agreed to provide financing to a merchant customer honours drafts drawn on it and receives possession of a negotiable document of title. Under section 24, the security interest in the collateral is perfected by possession. The bank releases the bill of lading to the merchant customer (debtor) so that he can obtain possession of the goods from the carrier. By virtue of section 26(2)(b) the bank has a temporarily perfected security interest in the document and the goods for 15 days. The bank registers its interest in the goods before the expiry of the 15 day period.[1] The bank continues to have a perfected security interest in the goods until they are sold by the merchant customer. After sale, the bank has a security interest in such proceeds which is initially perfected for 15 days by operation of law,[2] but which must thereafter be perfected by registration or possession.[3] As there is a continuous state of perfection without an intervening gap, the date of perfection with respect to the proceeds is when the bank first obtained possession of the bill of lading. If, in the example above, the secured party surrendered the document of title to the debtor and registered outside the 15 day period, the date of perfection will be the date of registration rather than the initial date of possession of the bill of lading.

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[1] The bank would be well advised to have its customer sign a security agreement in order to ensure compliance with the formal requirements of section 10. This point is examined more closely in the commentary accompanying section 10.

[2] See s.28(3).

[3] Note that under section 28(2) no registration is required if the original financing statement covers the original collateral and proceeds and if:

(a) the proceeds fall within the description of the original collateral;
(b) the financing statement describes the proceeds by type or kind; or
(c) the proceeds are cash proceeds.

A continuous perfection of a security interest is not significant when the priority competition is between a security interest and a seizing creditor, sheriff or representative of creditors, or a transferee. Section 20(1) provides that it is the perfection or non-perfection at the date of seizure, commencement of bankruptcy or transfer that is vital. See the commentary accompanying section 20. However, where the competition is between two secured parties, the continuous perfection rule of section 23(1) will often be important.

Section 23(2) ensures that the assignment of a security interest does not interrupt the perfection of it. The effect of an assignment is examined in greater detail in the commentary accompanying section 45.

2. Effect of Lapse of Registration

Section 23 only applies where there is a change in the method of perfection. Where a security interest is initially perfected by registration, an extension of that registration must be accomplished by a financing change statement under section 48(1). A second registration does not continue the registration of the first financing statement. Thus, when the first registration expires, perfection will date from the second registration.[4]

Where there has been a change in the method of perfection (e.g., the security interest was initially perfected by registration but later perfected by possession), section 23 applies and the security interest is continuously perfected from the date of the initial perfection by registration. Furthermore, section 23(1) makes it clear that the priority status obtained by the registration is maintained for the purposes of applying section 35 even though the initial registration may have lapsed, provided that there has not been a gap in perfection.

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[4] *Saskatoon Credit Union Limited* v. *Bank of Nova Scotia*, [1985] 6 W.W.R. 556, 42 Sask. R. 187 (Sask. Q.B.); *Moose Jaw* v. *Pulsar Ventures Inc.* (1985), 43 Sask. R. 247 (Q.B.).

PERFECTION BY POSSESSION

24.-(1) Subject to section 19, possession of the collateral by the secured party, or on his behalf by a person other than the debtor or the debtor's agent, perfects a security interest in:

(a) chattel paper;

(b) goods;

(c) instruments;

(d) securities;

(e) negotiable documents of title;

(f) money;

but, subject to section 23, only while it is actually held as collateral.

(2) For the purposes of subsection (1), a secured party is deemed not to have taken or retained possession of collateral which is in the apparent possession or control of the debtor or the debtor's agent.

Definitional Cross-References:

"chattel paper" - s.2(e)
"collateral" - s.2(f)
"debtor" - s.2(k)
"document of title" - s.2(m)
"goods" - s.2(s)
"instrument" - s.2(u)
"money" - s.2(z)
"person" - s.2(cc)
"secured party" - s.2(kk)
"security" - s. 2(11)
"security interest" - s.2(nn)

1. Scope
2. Perfection by Seizure or Repossession

1. Scope

Section 24 provides that a security interest in most categories of collateral may be perfected by possession. There are two exceptions. Intangibles (which include accounts) can not be perfected by possession because such collateral does not have a physical existence. Possession of a non-negotiable document of title will not perfect a security interest in the goods covered by the document, whereas possession of a negotiable document of title will have this effect.[1] As to the scope of the term "document of title", see the commentary accompanying sections 27 and 31.

The possession may be by the secured party, or it may be by a person who holds on behalf of a secured party. Section 27(1) provides further detail where the latter is the case. The debtor or his agent may not hold possession on behalf of a secured party for the purposes of section 24. Accordingly, when goods originally held in pledge are released to a debtor under a trust receipt in circumstances other than those enumerated in section 26(2), the security interest in them becomes unperfected as soon as the debtor acquires possession of the goods. The security interest is perfected under section 24 only so long as the secured party remains in possession of the collateral.

The Act does not define the term "possession". Moreover, the common law never assigned a particular definition to the term: the meaning could vary depending upon what issue was to be determined. In construing the term it is essential to recognize that perfection (whether by registration or by possession) is required in order to give a person the means of determining whether a debtor has granted a security interest in his property to another. Therefore, the possession by a secured party must be visible. This is confirmed by section 24(2) which provides that the possession will be insufficient for the purposes of section 24 if it is in the apparent possession or control of the debtor. At common law, the redelivery of the goods to the pledgor for some limited purpose did not destroy the pledge: the pledgor obtained the goods on behalf of the pledgee who continued in constructive possession of the goods.[2] Section 24(2) reverses this rule. The secured party's security interest will be rendered unperfected unless the security interest is perfected by some other means. In the past, delivery of keys could constitute constructive possession so as to constitute a pledge.[3] Under section 24 this is not sufficient, since it does not adequately withdraw possession of the collateral from the possession of the debtor so as to fulfil its notice function. Section 17 of the Act sets out the rights and duties of a secured party who has possession of the collateral.

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[1] Sections 24(1), 27(1).

[2] *North-Western Bank Ltd.* v. *Poynter*, [1895] A.C. 56.

2. Perfection by Seizure or Repossession

It is an open question in Canada whether repossession[4] of the collateral by a secured party constitutes perfection by possession. The American position is that it does; but the wording of the UCC provisions differ from that of the Canadian Acts.[5] The majority of decisions from Ontario[6] and Manitoba[7] hold that repossession may constitute possession for the purposes of section 24.

The opposing view[8] focuses on the express words of section 24, which appear to require a distinction to be drawn between possession and repossession. Section 24 requires that the property be held as collateral: i.e., possession must be for the purpose of securing the debtor's obligation. Where the secured party repossesses the collateral, the purpose of such possession is not to secure performance of the obligation. Rather, it represents the termination of the relationship and commencement of realization proceedings under Part V. There is much to be said for this view. It will discourage hasty realizations that are carried out to avoid the consequences of a defective or nonexisting registration or a failure to comply with section 10. This position has been accepted in Saskatchewan in *Re Hudon*.[9] If this view is not accepted and it is held that a security interest can be perfected by repossession, this position must nevertheless be qualified. First, repossession will not necessarily constitute a sufficient possession for the purposes of section 24. The secured party may have constructive possession for the purposes of Part V, yet will not satisfy section 24 since the property is not removed from the apparent possession of the debtor.[10] Where the realization involves the appointment of a receiver, possession of the collateral by the receiver may not be sufficient for the purposes of perfection if the receiver is viewed as agent of the debtor and not the secured party.[11]

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[3] *Young* v. *Lambert* (1870), L.R. 3 P.C. 142.

[4] Technically, the term repossession is inappropriate since there will be situations in which the secured party did not have possession at any time before seizing the collateral.

[5] See J.A. Carfagnini, "Statutory Requirements for Perfection by Possession under the Ontario Personal Property Security Act" (1982-83), 7 *Can. Bus. L.J.* 234.

[6] *Re Gilbert* (1979), 30 C.B.R. (N.S.) 291 (Ont. S.C.); *Re Olmstead; Ernst & Whinney Inc.* v. *Uniform Man (Woodstock) Ltd.* (1984), 4 P.P.S.A.C. 220 (Ont. S.C.); *Re Charron; D. & A. MacLeod Co.* v. *Bank of Nova Scotia* (1984), 4 P.P.S.A.C. 228 (Ont. S.C.). But see *contra, Re Taylor Enrg. Ont. Ltd.* (1981), 7 A.C.W.S. (2d) 148 (Ont. S.C.).

[7] *Sifton Credit Union Limited* v. *Barber*, [1986] 4 W.W.R. 341, at 358 (Man. C.A.).

[8] Carfagnini, *supra*, footnote 5.

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[9] [1986] 5 W.W.R. 125 (Sask. Q.B.). But see *Bank of Nova Scotia* v. *Royal Bank of Canada* (1986), 6 P.P.S.A.C. 71 (Sask. Q.B.) where the same judge came to the opposite conclusion. Since *Re Hudon* was the later decision, presumably it represents the accepted position.

[10] *Re Darzinskas* (1981), 132 D.L.R. (3d) 77 (Ont. S.C.). See also s.58(b) of the Saskatchewan Act.

[11] *Sperry Inc.* v. *Canadian Imperial Bank of Commerce* (1985), 17 D.L.R. (4th) 236 (Ont. C.A.); *Bank of Nova Scotia* v. *Royal Bank of Canada* (1986), 6 P.P.S.A.C. 71 (Sask. Q.B.).

PERFECTION BY REGISTRATION

25. Subject to section 19, registration of a financing statement perfects a security interest in any collateral but only during the period in which the registration of the financing statement or a financing change statement renewing the registration relating thereto is effective.

Definitional Cross-References:

"collateral" - s.2(f)
"financing change statement" - s.2(o)
"financing statement" - s.2(o)
"security interest" - s.2(nn)

Registration is a universal form of perfection: security interests in all categories of collateral may be so perfected. Perfection does not guarantee invulnerability or first priority. One method of perfection may in fact be superior to another. Perfection by possession may be a superior method when perfecting a security interest in money, instruments, securities, negotiable documents of title or chattel paper, since it will prevent the debtor from transferring the property to a third party who will be entitled to priority under section 31. A security interest in such property may be perfected by registration, but in permitting this the Act also recognizes the need to protect the special priority position of transferees of negotiable or quasi-negotiable property. Section 25 permits registration of a single financing statement covering a wide range of collateral, including negotiable property. This will insulate the security interest from attack by the trustee in bankruptcy or execution creditors of the debtor. At the same time, free transferability of negotiable and quasi-negotiable property is perserved.[1] Nothing prevents a secured party from using both methods of perfection. Perfection by registration may be used as a back-up measure should the secured party lose possession of the collateral or should a temporary perfection period expire.

The registration system is examined in greater detail in the commentary accompanying sections 42 to 54.

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[1] The Saskatchewan Act should be contrasted with the UCC and the Ontario PPSA. These statutes do not permit perfection by registration where the collateral is an instrument or security. The Manitoba PPSA permits perfection by registration in all types of collateral where the security agreement is in the form of a floating charge.

TEMPORARY PERFECTION IN RESPECT OF INSTRUMENTS, SECURITIES AND NEGOTIABLE DOCUMENTS OF TITLE AND IN COLLATERAL RETURNED TO THE DEBTOR

26.-(1) A security interest in instruments, securities or negotiable documents of title is a perfected security interest for the first 15 days after it attaches to the extent that it arises for new value given under a written security agreement.

(2) A security interest perfected under section 24 in:

(a) an instrument or securities that a secured party delivers to the debtor for the purpose of:

(i) ultimate sale or exchange;

(ii) presentation, collection or renewal; or

(iii)registration of transfer; or

(b) a negotiable document of title or goods held by a bailee that are not covered by a negotiable document of title, which document of title or goods the secured party makes available to the debtor for the purpose of:

(i) ultimate sale or exchange;

(ii) loading, unloading, storing, shipping or transshipping; or

(iii)manufacturing, processing, packaging or otherwise dealing with goods in a manner preliminary to their sale or exchange;

remains perfected for the first 10 days after the collateral comes under the control of the debtor.

(3) After the expiration of the periods of time mentioned in subsection (1) or (2), a security interest under this section is subject to the provisions of this Act for perfecting a security interest.

Definitional Cross-References:

"collateral" - s.2(f)
"debtor" - s. 2(k)
"document of title" - s.2(m)
"goods" - s.2(s)
"instrument" - s.2(u)
"secured party" - s.2(kk)
"security" - s.2(11)
"security agreement" - s.2(mm)
"security interest" - s.2(nn)
"value" - s.2(qq)

1. Scope
2. The Initial Fifteen-day Grace Period
3. Allowable Interruptions of Possession

1. Scope

Section 26 provides for the temporary perfection of security interests in certain types of collateral for a 15 day or 10 day period. This temporary perfection is automatic and unconditional: the security interest is perfected even though there has been no registration or possession by the secured party, and it is effective for the period specified. If the security interest is not perfected by some other means (by registration, by possession, or by application of some other temporary perfection period) before the expiry of the period of temporary perfection, the security interest thereafter becomes unperfected. If, however, it is perfected by other means within this period, section 23 will apply and the security interest will be continuously perfected from the date it was first perfected under section 26.

Temporary perfection is sufficient to protect the security interest from attack by the trustee in bankruptcy or the execution creditors of the debtor. However, it may not be sufficient to protect the security interest if the debtor transfers collateral classified as goods to a third party.[1] In addition, temporary perfection is no more effective than perfection by registration in situations where negotiable collateral is involved. See the commentary accompanying section 31.

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[1] See section 30(5).

2. The Initial Fifteen-day Grace Period

Section 26(1) provides a temporary perfection period which will apply only where the collateral is an instrument, security or negotiable document of title.[2] Furthermore, the grace period is available only where the secured party gives new value (as opposed to securing a pre-existing obligation). The reference to a written security agreement is redundant since there can be no attachment under section 12 and therefore no perfection, temporary or otherwise, until such a requirement has been satisfied.

In many cases a resort to the temporary perfection period in section 26(1) will be unnecessary because the secured party will be able to take advantage of the purchase-money security interest priority rule in section 34(1).

3. Allowable Interruptions of Possession

Section 26(2) applies where the secured party has possession of the collateral (and therefore has a perfected security interest by virtue of section 24), but subsequently surrenders possession of it to the debtor for some temporary and limited purpose. There is no new value requirement as is the case in section 26(1). The 10-day grace period commences the moment the debtor obtains control of the collateral. It is unsettled whether the writing requirements of section 10 must be satisfied before releasing possession to the debtor.[3] Until this question is answered by the courts, the secured party would be well advised not to surrender possession to the debtor until the debtor has signed a trust receipt or similar document in which the collateral is described by type or kind.

Section 26(2)(a) applies to an instrument or security. For example, it may be useful for the secured party to relinquish possession to permit the debtor to exchange a convertible debenture for common shares. Section 26(2)(b) applies to negotiable documents of title and to goods not covered by a negotiable document of title. A bank to whom a negotiable document of title has been pledged may release the document to the debtor to permit the debtor to resell the goods. In this situation there may be back-to-back periods of temporary perfection as displayed in the following scenario: A bank releases a negotiable document of title to the debtor on May 1 so that the debtor may resell the goods. The debtor sells the goods on May 10 on credit, thereby generating an account. Here, the security interest in the document of title (and the goods covered by it) is temporarily perfected. Since the bank consented to the resale, it loses its security interest in the collateral, but by virtue of section 28(1)(b) obtains a security interest in the proceeds (the account). By virtue of section 28(3), the bank will have a perfected security interest in the account until May 25.

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[2] As to what constitutes a negotiable document of title see the commentary accompanying sections 27 and 31.

[3] This point is examined in the commentary accompanying section 10.

PERFECTION WHERE GOODS HELD BY BAILEE

27.-(1) A security interest in goods in the possession of a bailee is perfected by:

(a) issuance of a document of title in the name of the secured party;

(b) a holding on behalf of the secured party pursuant to section 24;

(c) registration as to the goods; or

(d) perfection of a security interest in the negotiable document of title in cases where the bailee has issued a negotiable document of title covering the goods.

(2) The issuance of a negotiable document of title covering goods does not preclude any other security interest in the goods from arising during the period that the negotiable document of title is outstanding.

(3) A security interest in the negotiable document of title covering goods takes priority over a security interest in the goods otherwise perfected after the goods become covered by a negotiable document of title.

(4) Notwithstanding subsection (3), a perfected security interest in goods takes priority over the security interest in a negotiable document of title covering goods, where the security interest in the goods was registered at the time the security interest in the negotiable document of title was perfected.

Definitional Cross-References:

"document of title" - s.2(m)
"goods" - s.2(s)
"secured party" - s.2(kk)
"security interest" - s. 2(nn)

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1. The Distinction between Negotiable and Non-negotiable Documents of Title.
2. Perfecting a Security Interest in Goods Covered by a Negotiable Document of Title.
3. Perfecting a Security Interest in Goods Covered by a Non-negotiable Document of Title.

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1. The Distinction between Negotiable and Non-negotiable Documents of Title

A distinction between negotiable and non-negotiable documents of title is draws in section 27. A document of title merely denotes a receipt for goods in a bailee's possession which establishes that the person in possession of the document is entitled to hold and dispose of the document and the goods it covers. See section 2(m). The two most commonly used documents of title are a bill of lading issued by a carrier for goods in transit, and a warehouse receipt issued by a warehouseman for goods in storage.

A negotiable document of title (though not separately defined by the Act) is one which may be transferred. This is accomplished by endorsement (unless the document is made out to "bearer" or "holder") and transfer of possession of the document. Transfer of a negotiable document of title is equivalent to a transfer of the goods covered by it. The common law recognized only one form of negotiable document of title: the order bill of lading. This is a bill of lading made out to bearer or to the order of a named consignee. The basic idea behind the negotiable document of title is that the bailee holds possession of the goods for whomever holds the document, and will not release the goods unless the document is surrendered.

All other forms of documents of title are non-negotiable. Bills of lading that are made out to a named consignee without the additional words "or order" are termed straight bills of lading and delivery of the document to another will not be effective in transferring constructive possession of the goods. Warehouse receipts are similarly non-negotiable.[1] A non-negotiable document of title is little more than a receipt. It need not be presented in order for the consignee to obtain possession of the goods from the bailee.

2. Perfecting a Security Interest in Goods Covered by a Negotiable Document of Title

Section 27(1)(d) recognizes that a negotiable document of title symbolizes the goods so that a security interest in the goods may be perfected by perfecting a security interest in the negotiable document of title. However, section 27(2) provides that a security interest may also be created and perfected in the underlying goods covered by a negotiable document of title. Thus, a security interest in goods covered by a negotiable document of title may be perfected in three ways:

(1) taking possession of the document of title;

(2) registering in respect of the document of title;

(3) registering in respect of the goods.

Sections 27(3) and (4) merely reiterate the first to register or perfect rule in section 35. Registration as to the underlying goods may prove to be the superior method of perfection.[2] By virtue of section 27(4), registration will ensure priority over a subsequent secured party who takes possession of a negotiable document of title covering the goods. Moreover, the secured party will not be subject to defeat by a holder to whom a negotiable document has been negotiated since section 31(4) will not apply. This section provides a priority rule applicable only to competing security interests in the same document of title but not to a competition between a security interest in the goods and a security interest in the document of title to the goods.

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[1] See generally R.J. Wood, "The Pledge of Documents of Title in Ontario" (1984), 9 *Can. Bus. L. J.* 81. Some jurisdictions such as Ontario and Alberta have adopted the Warehouse Receipts Act which makes warehouse receipts negotiable. Saskatchewan has not adopted such legislation.

[2] It should be noted that the UCC and the Ontario and Manitoba PPSA's have no equivalent to section 27(4). As a result, perfection by possession of a negotiable document of title will generally defeat a prior registration in respect of the goods.

3. Perfecting a Security Interest in Goods Covered by a Non-negotiable Document of Title

The PPSA regards the straight bills of lading and the warehouse receipt as little more than a scrap of paper. Possession of the document or registration in respect of it does not perfect a security interest in the goods described in it. The secured party must perfect his security interest directly in the goods. This may be done by registration (section 27(1)(c)). It may also be accomplished by ensuring that the bailee holds on behalf of the secured party: either by issuing documents of title in the name of the secured party (section 27(1)(a)), or by attornment whereby the bailee acknowledges that he now holds the goods as agent for the secured party rather than for the debtor (section 27(1)(b)).

PERFECTION OF PROCEEDS

28.-(1) Subject to the other provisions of this Act, where collateral is dealt with or otherwise gives rise to proceeds, the security interest therein:

(a) continues as to the collateral unless the secured party expressly or impliedly authorizes such dealing; and

(b) extends to the proceeds.

(2) A security interest in proceeds is a continuously perfected security interest if the interest in the original collateral is perfected:

(a) by the registration of a financing statement which covers the original collateral and proceeds therefrom and contains a prescribed description;

(b) by the registration of a financing statement which covers the original collateral and proceeds, where the proceeds are of a type or kind which fall within the description of the original collateral;

(c) by the registration of a financing statement which covers the original collateral and proceeds therefrom, where the proceeds are cash proceeds.

(3) In a case other than one mentioned in subsection (2), a security interest in proceeds is a continuously perfected security interest if the interest in the original collateral was perfected, and the security interest in the proceeds remains perfected for a period of 15 days after receipt of the proceeds by the debtor but becomes unperfected thereafter, unless the security interest in the proceeds is otherwise perfected by any of the methods and under the circumstances prescribed in this Act for original collateral of the same type or kind.

Definitional Cross-References:

"cash proceeds" - s.2(ee)
"collateral" - s.2(f)
"debtor" - s.2(k)
"financing statement" - s.2(o)
"proceeds" - s.2(ee)
"secured party" - s.2(kk)
"security interest" - s.2(nn)

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1. Continuation of Security Interest in Original Collateral and Extension to Proceeds
2. Proceeds: Identifiable or Traceable
3. Tracing Principles
4. Security Interests in Proceeds and the Right of Set-off
5. Perfecting a Security Interest in Proceeds
6. Index of Other Provisions Respecting Proceeds

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1. Continuation of Security Interest in Original Collateral and Extension to Proceeds

Section 28(1)(a) provides that, subject to the other provisions of the Act, where the original collateral is dealt with so as to give rise to proceeds, the security interest continues as to the original collateral. Thus, the secured party will continue to have rights in the collateral which will allow him to seize and sell the collateral under Part V, even though the collateral has been transferred to a third party. However, other sections of the Act may cause the secured party to lose his security interest in the original collateral, or provide for the subordination of his security interest in it. These sections are summarized below:

Section	
20(1)	An unperfected security interest is subordinate to the interests of certain transferees.
28(1)(a)	The secured party loses his security interest in the original collateral if he expressly or impliedly authorizes the debtor's dealing.
30	Certain buyers and lessees take free of the security interest in the original collateral.
31	Certain holders of money and negotiable documents of title, and certain purchasers of instruments, securities or chattel paper have priority over a security interest in the original collateral.

Even though the secured party has lost his security interest in the original collateral, his security interest will extend to any proceeds. For example, in the case of a sale of goods by the debtor, if the buyer paid part of the price by cheque and gave a trade-in for the balance, the debtor will have a security interest in the cheque and in the trade-in. If the original collateral is destroyed, the secured party's security interest extends to any insurance proceeds. See section 2(ee).

Where the secured party does not lose his security interest in the original collateral (e.g., the dealer sells the goods out of the ordinary course of business so that section 30(1) does not apply, and the secured party does not authorize the transaction), the security interest continues in the original collateral in the hands of the third party. A difficult question of statutory interpretation arises in cases where there is an unauthorized disposition of collateral by the debtor which results in proceeds coming into the hands of the debtor. Under section 28(1)(a), the secured party has a right to enforce his security interest in the original collateral in the hands of a third person. Section 28(1)(b) states that his security interest "extends to the proceeds". The question is whether the section provides for cumulative or alternative rights to the two types of collateral: the original collateral in the hands of the third party; the proceeds in the hands of the debtor. The wording of the section would appear to support the argument for cumulative rights. The Official Comment accompanying Article 9-306(2) (the UCC equivalent of section 28) states: "The secured party may claim both proceeds and collateral, but may of course have only one satisfaction".[1]

In order to arrive at an acceptable result it is necessary to examine the policy underlying section 28. The problem is demonstrated in the following scenario. The debtor (D) sells to a buyer (B) collateral subject to a perfected security interest held by a secured party (SP), under circumstances in which B acquires his interest in the collateral subject to SP's security interest. B then resells the collateral to B1, who at the time of the sale is unaware of SP's security interest. Since the collateral was of a type that is not described by serial number on SP's financing statement, a search result obtained by B1 before he bought the collateral did not reveal SP's security interest. It is clear that under section 28, SP's security interest continues in his original collateral and extends to the proceeds of it. The sale from D to B involved the transfer of property (a trade) from B to D. This property is proceeds of the original collateral.

The policy question that arises in this context is whether SP can enforce his contractual security interest against the original collateral and his section 28 statutory security interest against the proceeds, or is he required to elect between proceeding against the original collateral and the proceeds collateral?

A beginning point is to recognize that section 28 was designed to provide a method through which a secured party can have an effective security interest in property received by the debtor when the original collateral was disposed of. The right to proceeds is of vital importance in the context of the secured financing of inventory where it is understood that the original collateral will be sold by the debtor in his business. One may perhaps come to the conclusion that proceeds are to be viewed as a substitute for the original collateral and that the legislative purpose of section 28 is to provide for an automatic, deemed security interest in proceeds exercisable when it is legally impossible or commercially impracticable (an assessment to be made by the secured party) for the secured party to enforce his security interest in the original collateral. It follows from this that if SP exercises his rights against the original collateral he cannot also enforce his statutory security interests in proceeds against the proceeds. Alternatively, if he enforces his security interest in the proceeds, he cannot seize the original collateral in the hands of B1.

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[1] The wording of Article 9-306(2) leaves no doubt on the matter. It provides that the security interest continues in the original collateral "and also continues in identifiable proceeds...".

This approach to section 28 can draw support from the rules of equity under which a person who invokes the equitable right to trace is required to elect between adopting the disposition of the property (and claiming the proceeds) and asserting the invalidity of the disposition (and claiming the trust property).[2] The obvious difficulty with the approach is that it involves reading section 28 as being subject to a major qualification that does not appear to be warranted by its wording.

There is another approach to the interpretation of section 28 that permits a straightforward application of its provisions without allowing a secured party to have a windfall at the expense of a person who acquires the collateral subject to an outstanding security interest. In the scenario set out above, the debt secured by SP's security interest is $10,000. The value of the original collateral was $8,000 at the time of the sale by D to B. If at the date of enforcement of SP's security interest the value of the proceeds is $3,000 and the value of the original collateral is $5,000 there can be no objection to allowing SP to enforce his security interest in both types of collateral to the extent necessary to recover $8,000. All he would be recovering is the value of his original collateral at the date of the unauthorized disposition of it by D. However, section 28 should not be read as giving SP the right to proceeds against both the original collateral and the proceeds so as to be able to recover enough to retire the full

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[2] See R.M. Goode, "The Right to Trace and its Impact in Commercial Transactions - II" (1976), 92 *Law Q. Rev.* 528, at 543-44. Under the common law, however, an action brought against the initial converter for money had and received (i.e., an action to require him to surrender the proceeds of the sale of the property) involves a waiver of the tort as far as the initial converter is concerned, but it does not preclude the pursuit of a remedy as well against a person to whom the property was transferred. See *United Australia Ltd.* v. *Barclays Bank, Ltd.*, [1941] A.C. 74, [1940] All E.R. 20. (H.L.).

$10,000 debt owing to him by D. To do so would be to read the section as giving to SP more collateral and a better security position than he bargained for in his security agreement with D. There is nothing in the basic structure or policies underlying the Act to justify this interpretation of section 28.

It has been held in *Canadian Commercial Bank* v. *Tisdale Farm Equipment Ltd.*[3] that where a secured party authorizes a sale on the express condition that it be paid $50, 000 from the proceeds of such dealing, the security interest continues in the original collateral until that condition is met. One must be careful not to extend this decision too far. It should not be taken as authority that the security interest in the original collateral continues if the debtor does not pay the proceeds to the secured party (i.e., the express condition was between the secured party and the debtor). In such a case the sale should be regarded as an authorized one: a third party purchaser should not suffer because of the secured party's failure to police the debtor.[4] The ruling should be restricted to the case where there is an express condition between the secured party and a third party purchaser that the security interest would be discharged upon payment of the proceeds from the purchaser to the secured party.

There are two limiting principles associated with the extension of the security interest to the proceeds. First, the proceeds collateral must be "identifiable or traceable". Second, the security interest in the proceeds collateral must be perfected in order to have priority over most third party interests.

2. Proceeds: Identifiable or Traceable

Proceeds are defined in section 2(ee) as "identifiable or traceable personal property derived directly or indirectly from any dealing with the collateral or proceeds therefrom". The Ontario Court of Appeal has suggested that:[5]

> Proceeds are identifiable when they continue to exist in their original form. They are traceable if they are converted into a substituted form which can be located and determined to be the substitution for the original proceeds.

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[3] [1984] 6 W.W.R. 122 (Sask. Q.B.), aff'd [1987] 1 W.W.R. 574 (Sask. C.A.).

[4] See *Milnes* v. *General Electric Credit Corporation*, 377 So. 2d 725, 27 U.C.C. Rep. 1428 (Fla. App. D.C.).

[5] *General Motors Acceptance Corp. of Canada Ltd.* v. *Bank of Nova Scotia* (1986), 55 O.R. (2d) 438, at 442.

There is little to be said for this distinction in a Saskatchewan context because of the difference in wording between the Saskatchewan Act and the Ontario Act. A reading of section 2(ee) reveals that the requirement that the property be identifiable or traceable applies equally to the original proceeds and to the second generation proceeds. Professor Donovan Waters[6] has observed that "identifiable" refers to the ability to point to the particular property obtained by the debtor as a result of the dealing with the collateral, while "traceable" refers to the situation where the collateral is commingled with other property so that its identity is lost. Mr. Justice Matheson has observed that:[7]

> Although the right to trace is implicit in the definition of "proceeds", there are no rules in the *P.P.S.A.* delineating the extent to which proceeds may be traced. It must, therefore, be assumed that it was the intention of the Legislature that the common law and equitable rules relating to tracing would be invoked.

Identification of the proceeds will not usually be controversial. An automobile taken as original collateral may be sold in return for a cheque and a trade-in. So long as it is possible to point to which cheque and which trade-in, the requirement is satisfied. Deposit of the cheque into a bank account should not in itself result in loss of identification. The deposit will itself represent a dealing with the cheque which results in the creation of an account as proceeds collateral (in effect proceeds of proceeds). It is not the deposit into the account, but rather the mixing of funds that causes a loss of identification. It is at this point that tracing principles must be applied.

The first issue that must be addressed is whether a fiduciary relationship between the debtor and the secured party must be established before the tracing rules can be applied. The Ontario Court of Appeal[8] has held that this relationship must exist. It concluded that the absence in the security agreement of a clause requiring the debtor to hold proceeds separate and apart from other funds or to hold the proceeds in trust for the secured party was fatal to a claim to proceeds. Equitable tracing principles were not available. It would be a mistake to accept this conclusion as reflecting Saskatchewan law. Some commentators have argued that the notion that a mixing of funds defeats the common law right to trace cannot be supported.[9] If this were so, then common law tracing rules (the right to follow) may be applied, and there will be no need to establish a fiduciary duty as there is where equitable tracing rules are to be applied. In any case, it is difficult to read into the Act a requirement that there be a fiduciary duty in light of the express wording of the provision. Section 28(1)(b) gives the secured party an automatic right in the proceeds. There is now a statutory basis for extending the security interest to the proceeds, and the old requirement of a fiduciary duty is no longer needed.

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[6] "Trusts in the Setting of Business, Commerce, and Bankruptcy" (1983), 21 *Alta. Law Rev.* 395, at 431-34.

[7] *Prince Albert Credit Union Ltd.* v. *Cudworth Farm Equipment Ltd.* (1985), 45 Sask. R. 67, at 71 (Q.B.).

[8] *General Motors Acceptance Corp. of Canada Ltd.* v. *Bank of Nova Scotia, supra,* footnote 5.

More difficult issues arise when a tracing claim is raised against a third party rather than against the debtor. The controversy may be illustrated by the following scenario: An automobile manufacturer (SP) takes a purchase money security interest in the vehicles supplied by it to a dealer (D). SP perfects its security interest by registration and describes the original collateral as "automobiles". SP also claims proceeds and describes these as "accounts, chattel paper, used automobiles". D sells a number of automobiles to his customers and receives cheques and trade-ins. He deposits the cheques into his current account (and thereby mixes the money with his own funds). He also sells the trade-ins and deposits the money into his account. The dealer then buys 15 used automobiles from another source and withdraws all the money from the bank account to pay for them. He subsequently resells these vehicles to another dealer (B), but this sale does not take place in the ordinary course of business.

It is not unreasonable to think that because SP had described the proceeds by type or kind,[10] it would have priority over the buyer (B).

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[9] R.M. Goode, "The Right to Trace and its Impact in Commercial Transactions - I" (1976), 92 *Law Q. Rev.* 360, at 393-96; G.H.L. Fridman and J.G. McLeod, *Restitution* (1982), at 570-73. See also R.A. Pearce, "A Tracing Paper" (1976), 40 *Conv.* (N.S.) 277 who further concludes that the belief that a fiduciary duty is needed to trace in equity is ill-founded.

[10] All SP would be required to do is to include "automobile" in the original collateral description on his financing statement in order to have a perfected security interest in the traded-in automobile. See section 28(2)(b).

who would not be entitled to priority under section 30(1) because the sale did not occur in the ordinary course. Before buying the automobile, B could have obtained a search result from the registry that would have disclosed SP's security interest in all automobiles owned or to be owned by D. On the other hand it might be argued that the claim to proceeds ended when B purchased the automobiles for value and without notice. The proceeds lost their identity when they were mixed in the dealer's bank account. Therefore any claim to proceeds would necessarily depend upon tracing principles. In equity, a good faith purchaser without knowledge defeats a tracing claim. Therefore, dealer B may argue that the vehicles ceased to be proceeds within the meaning of the Act since they were no longer traceable.

Although a plausible interpretation of the Act, it has not received support. The trouble with this approach is described as follows:[11]

> This result appears to be somewhat anomalous. The priority dispute between the secured party and the purchaser is resolved by reference to an external body of rules and not to the priority structure of the personal property security legislation. If the purchaser acquired from the debtor identifiable proceeds rather than proceeds earmarked through tracing principles he would have been subject to the priority rules of the legislation and would take subject to the secured party's interest. Since the drafters of the Canadian legislation clearly intended to establish a comprehensive and complete scheme of priorities applicable to all types of collateral, the answer, in our view, should be that this aspect of the doctrine of tracing does not apply to the construction of the statutory proceeds provisions.

Different considerations may apply where it is not the debtor but rather a third party who is in possession of the proceeds. The PPSA requires that the secured party perfect its security interest in proceeds that are in the debtor's hands, and this requirement should be taken to supercede equity's good faith purchaser rule. However, it may still be appropriate to apply the good faith purchaser rule if the secured party is asserting a claim to proceeds against a purchaser who obtains proceeds collateral from a person other than the debtor. In such cases the secured party is not required to perfect his security interest in those proceeds, and there is therefore no good reason for refusing to apply the equitable rule. Thus in the preceding example, if B resold one of the automobiles (proceeds collateral) to C, a stronger case could be made for applying the good faith purchaser rule in favour of C.

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[11] J.S. Ziegel and R.C.C. Cuming, "The Modernization of Canadian Personal Property Security Law" (1981), 31 *U. of Toronto Law J.* 248, at 280.

3. Tracing Principles

Although it is common to refer to the principles of an equitable tracing action as "rules", it is perhaps more accurate to think of them as a set of presumptions. The Act casts upon the courts the difficult task of deciding which of these presumptions ought to be applied to a tracing claim under section 28. The Ontario Court of Appeal has shown a reluctance to apply tracing rules into an active bank account where deposits into the account and withdrawals from it are made in the ordinary course of business.[12] This reluctance is difficult to explain. Mixture of funds in an active account is the traditional bailiwick of the equitable tracing rules. Furthermore, American cases have displayed little reluctance to apply equitable tracing rules in order to trace funds into a current account even though the UCC provides that the security interest continues in any "identifiable" proceeds.[13] The reference to "identifiable or traceable" property in section 2(ee) of the Saskatchewan Act indicates that the Legislature intended that appropriate features of the law of tracing should be incorporated into the PPSA's system for providing security interests in proceeds.

Assuming that this is the case, what presumptions should be applied? There is no Saskatchewan case law on point. The authors suggest the following approach which has the advantage of being consistent with equitable tracing principles and compatible with the underlying policies of the Act:

> (1) Where money proceeds are deposited into an active account and mixed with the debtor's own funds, the debtor should be presumed to spend his own money first. This has become known

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[12] *General Motors Acceptance Corp. of Canada Ltd.* v. *Bank of Nova Scotia*, *supra*, footnote 5.

[13] *Michigan National Bank* v. *Flowers Mobile Homes Sales, Inc.*, 217 S.E. 2d 108 (N.C. App. 1975).

in the United States as the "lowest intermediate balance" rule.[14] This presumption finds further support in traditional tracing principles.[15]

(2) The presence of an agency or trust proceeds clause should be irrelevant to the operation of section 28. Section 28(1)(b) provides that the security interest continues in the proceeds, and this obviates the need for such a clause or any other indicia of a fiduciary relationship between the parties. Where such a clause is included in a security agreement, it should not be viewed as invoking the law of trusts, but should be viewed as a term in the security agreement that gives the secured party a security interest in the proceeds and that places contractual obligations on the debtor with respect to how proceeds collateral is to be handled by him.

(3) If, after applying the presumption that the debtor withdraws his own money first, the account balance nevertheless dips below the total amount of traceable proceeds, the security interest must be adjusted downward by applying the lowest intermediate balance rule. For example, suppose that (i) $50,000 of proceeds are deposited in the debtor's current account and commingled with $5,000 of the debtor's own money. The debtor (ii) withdraws $30,000 to pay creditors. Later (iii) a $10,000 bank loan is deposited into the account. The following table explains how the lowest intermediate balance rule would operate:

Proceeds Deposited	Non-proceeds Deposited	Withdrawals	End Balance	Proceeds Remaining in Account
(i) $50,000			$55,000	$50,000
(ii)		$30,000	$25,000	$25,000
(iii)	$10,000		$35,000	$25,000

The debtor in paying off his creditors is presumed to use his own money first. Nevertheless there is a shortfall of $25,000 which causes the proceeds claim to be reduced. The subsequent addition of $10,000 of non- proceeds money does not accrue to the proceeds balance.[16] However, if there is evidence that the debtor intended that the $10,000 deposit was made to replace proceeds amounts withdrawn, this amount again becomes proceeds.[17]

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[14] *Ibid.* See also *Universal C.I.T. Credit Corporation* v. *Farmers Bank of Portageville* 358 F. Supp. 317 (E.D. Mo. 1973); *In re Turner*, 32 U.C.C. Rep. 1240 (D. Neb. (Bankr.) 1981).

[15] *Re Hallett's Estate* (1879), 13 Ch. D. 696, [1874-80] All E.R. Rep. 793 (C.A.).

(4) If the debtor withdraws money in order to purchase inventory or other property, the secured party should be allowed to trace its claim into the inventory only to the extent that the proceeds money was expended after the debtor's funds had been notionally exhausted.[18] Suppose that in the preceding example, the debtor (iv) withdraws $20,000 and uses it to purchase inventory. The account balance immediately prior to this was $35,000 of which $25,000 was attributable to the proceeds claim. Again, the presumption is that the debtor uses his own money first. Thus, $10,000 of the debtor's money and $10,000 of the proceeds money are used to purchase the inventory, and the secured party will have a proceeds claim against the inventory to the extent of $10,000 as well as a proceeds claim to the remaining $15,000 in the bank account. If the debtor subsequently withdraws the $15,000 from the bank account, the secured party's proceeds claim is simply reduced; it does not cause the proceeds claim in the inventory to increase.[19]

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[16] *Universal C.I.T. Credit Corp.* v. *Farmers Bank of Portageville*, *supra*, footnote 14. And see *British Canadian Securities Limited* v. *Martin* (1917), 1 W.W.R. 1313 (Man. K.B.) which adopted the lowest intermediate balance rule and held that a subsequent deposit of the debtor's money into the account does not resuscitate the claim previously reduced.

[17] D.W.M. Waters, *Law of Trusts in Canada* (2nd ed. 1984), at 1048.

[18] *C.O. Funk & Sons, Inc.* v. *Sullivan Equipment, Inc.*, 415 N.E. 2d 1309, 30 U.C.C. Rep. 1459, (Ill. App. 1981), aff'd 32 U.C.C. Rep. 1638.

[19] This suggestion represents a departure from traditional tracing principles. In *Re Oatway*, [1903] 2 Ch. 356 the court refused to apply the presumption that the trustee expends his own money first, but instead held that the beneficiary has a charge on all property bought from money from the account. See also *In re The Winding-Up Act*, [1938] 2 W.W.R. 375 (Sask. C.A.). It is suggested that this principle should not be extended to the tracing of proceeds, since its application should be limited to the true trust situation. See *C.O. Funk & Sons, Inc.* v. *Sullivan Equipment, Inc.*, *ibid.*, in which the court recognized the presumption that the debtor spends his own money first as the dominant principle, and therefore did not allow tracing into second generation inventory so long as the secured party's proceeds in the bank account were notionally intact. The subsequent dissipation of this account did not change things (at least insofar as a third party was concerned).

(5) A situation may arise where the debtor mixes together proceeds money from two separate security interests taken by two different secured parties. This is likely to occur where two suppliers have taken purchase-money security interests in inventory sold by them to the debtor. Upon selling the inventory, the proceeds are mixed in an active current account (and perhaps mixed with the debtor's own funds as well). Again, if the debtor has mixed the proceeds money with his own, the initial presumption is that he first exhausts his own funds. However, after doing so, it must be determined which of the two proceeds claims is eroded first. Here the court may choose to apply the rule in Clayton's Case.[20] It is presumed that withdrawals are made against the earlier sums credited to the account ("first in, first out"). Recently there has been a move against applying the rule in Clayton's Case where two trust beneficiaries are involved. Instead a pro rata depletion of the fund is favoured.[21] However, where there has been a commingling of two proceeds claims, a stronger argument can be made for the continued application of the rule in Clayton's Case. The first in, first out rule makes sense in a commercial context. Likely the proceeds will be deposited in the account over a period of time as the inventory is sold. The rule in Clayton's Case would tend to give priority to the holder of the security interest in the most recently deposited proceeds.

In cases where accounting records do not establish the sequence of events, some other rule must be applied. One approach is to opt for a pro rata depletion and distribution between (or among) the secured parties.[22] Another approach, and one more consistent with the overall scheme of the Act, would be to allow both to trace into the general fund, but to resolve priorities pursuant to the ordinary priority rules of the Act.

Finally, it should be noted that although the tracing rules will generally permit the secured party to have a security interest in money deposited into an active current account, and in some cases to inventory or other property in the debtor's hands that is purchased with money withdrawn from the account, section 31 of the Act will cut off any proceeds claim against certain holders or transferees of money that is proceeds collateral.

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[20] *Devaynes* v. *Noble; Clayton's Case* (1816), 1 Mer. 529, 35 E.R. 767; *Royal Bank of Canada* v. *Bank of Montreal*, [1976] 4 W.W.R. 721 (Sask. C.A.).

[21] *Re Ontario Securities Commission and Greymac Credit Corp.* (1986), 30 D.L.R. (4th) 1 (Ont. C.A.).

[22] *Ibid.*

4. Security Interests in Proceeds and the Right of Set-off

A priority competition frequently arises where an inventory supplier makes a proceeds claim against money proceeds deposited into the debtor's operating deposit account. The deposit-taking institution (hereafter referred to as "the bank") counters with a claim of set-off in respect of a loan made by it to the debtor. The bank's claim to a set-off should generally succeed unless it had knowledge that a third party had an interest in the operating account. This can be justified on either of two grounds. First, Canadian and English authority establishes that a bank is entitled to an equitable right of set-off against money subject to a trust in favour of third parties unless it has knowledge of the trust character of the money on deposit.[23] There is another reason - more complex, but perhaps more appropriate in the context of the PPSA. Upon being deposited into the bank account, the secured party's right to the money as proceeds arising out of a collection of a cheque by the bank is lost by virtue of section 31(1). In its place, the dealing with the bank generates proceeds in the form of an account. See section 2(b). The competing claims are not strictly speaking to money in a bank account, but to an interest in an account. In effect, section 28 provides an automatic assignment of this account. The bank is in the position of a debtor under an assigned chose in action. The priority competition is then determined by applying the principles reflected in sections 5 and 6 of The Choses in Action Act.[24] The bank will be entitled to exercise set-off up to the time when it receives notice of the security interest in the account (i.e., its debt to the depositor).

The American case authority is divided on this issue. Some courts simply view the bank as an unsecured creditor, and hold that its right of set-off is subordinate whether or not the bank had knowledge of the security interest,[25] while others hold that the bank's right of set-off is subordinate to the secured party's interest in the account as proceeds even if the bank was without notice at the date of set-off unless the bank can show that it had "superior equities".[26] Still others have held that the bank cannot exercise its common law right of set-off if it had notice of the security interest.[27]

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[23] *Foothill Lumber Ltd.* v. *Bank of Montreal* (1959), 19 D.L.R. (2d) 618 (Ont. C.A.); *Gray* v. *Johnston* (1868), L.R. 3 H.L. 1.

[24] R.S.S. 1978, c. C-11.

5. Perfecting a Security Interest in Proceeds

As between the debtor and the secured party it does not matter whether a security interest is perfected. Perfection of a security interest in proceeds is significant only when there is a competition with a third party. Even if the court upholds a tracing claim so that the secured party's security interest continues in the proceeds collateral, it will generally be subordinate to the interests of third parties unless it has been perfected. See section 20. Subsections 28(2) and (3) provide rules governing the perfection of a security interest in proceeds. Subsection 28(2) provides that no further perfection steps need be taken in three situations. All require that the original collateral be perfected by registration, and that the financing statement cover the original collateral and proceeds (presumably this means that the proceeds box on Line J of the financing statement must be marked). The security interest in the proceeds collateral will be perfected if the proceeds fall within the general collateral description on lines O to Q, or the proceeds description on lines R to S. Even if the proceeds are not so described, a security interest in them will be perfected if they are "cash proceeds". Section 2(ee) defines cash proceeds as "money, cheques and deposit accounts in banks, credit unions, trust companies or similar institutions". Therefore, the proceeds claim into a bank account will generally not require any further perfection step to be taken.

Section 28(2) cannot be invoked by a secured party unless its security interest in the original collateral is perfected by registration.[28] If subsection 28(2) is met, then the security interest will be continuously perfected and, unless some other priority Act applies, the priority of the security interest in the proceeds will be the same as the priority of the security interest in the original collateral.

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[25] *Citizens National Bank of Whitley County v. Mid-States Development Company, Inc.*, 380 N.E. 2d 1243, 24 U.C.C. Rep. 1321 (Ind. App. 1978).

[26] *Commercial Discount Corp. v. Milwaukee Western Bank*, 214 N.W. 2d 33 (Wis. 1974).

[27] *National Acceptance Company of America v. Virginia Capital Bank*, 498 F. Supp. 1078, 30 U.C.C. Rep. 1145 (E.D. Va. 1980), rev'd on other gounds, 673 F. 2d 1314 (4th Cir. 1981). See also F.A. Rauer, "Conflicts Between Set-offs and Article 9 Security Interests" (1986), 39 *Stanford Law Rev.* 235, at 248-50.

Section 28(3) provides a period of temporary perfection in cases where the security interest in the proceeds is not perfected under section 28(2). The security interest in proceeds is continuously perfected for 15 days after the debtor receives them provided that the security interest in the original collateral was perfected. The secured party must perfect the security interest within this 15 day period in the same manner as if it were original collateral. If so, the security interest is continuously perfected. If not, the security interest thereafter becomes unperfected.[29] Temporary perfection under section 28(3) will not, however, be effective to give the security interest priority over the following parties if the transaction occurs while the security interest in proceeds is perfected by virtue of the temporary perfection of section 28(3):

(a) a buyer or lessee of goods who takes delivery of them, who gives new value, and who buys or leases without notice of the security interest - s.30(5);

(b) a holder of money who has no notice of the security interest, and a holder for value whether or not he has such notice - s.31(1);

(c) a purchaser of an instrument or security who gave value and acquired his interest without notice and who took possession of the instrument or security - s.31(3);

(d) a holder of a negotiable document of title who gave value and took it without notice that it was subject to a security interest - s.31(5).

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[28] *Gates Fertilizers Ltd.* v. *Waddell* (1985), 5 P.P.S.A.C. 79 (Sask. Q.B.).

[29] Note that the Saskatchewan Court of Appeal in *Central Refrigeration & Restaurant Services Inc.* v. *Canadian Imperial Bank of Commerce* (1986), 47 Sask. R. 124 held that where the bankruptcy occurs at a time when the security interest in proceeds is perfected under s.28(3) the subsequent failure to perfect did not result in subordination of the security interest under s.20(1)(d). See the commentary accompanying section 20 in which this case is examined.

6. Index of Other Provisions Respecting Proceeds

An index of other provisions of the Act respecting proceeds follows:

10(2)	Lack of description of proceeds in security agreement not fatal.
34(1)	Priority of purchase money security interest in non-inventory collateral or its proceeds.
34(2),(3)	Priority of purchase-money security interest in inventory or its proceeds.
34(3)	Purchase-money security interest in proceeds of inventory subordinate to security interest in accounts given for new value.
34(6)	Priority of perfected security interest in crops or its proceeds.
35(3)	Date for determining priority of conflicting security interests in proceeds.

PERFECTION AND PRIORITY WHERE GOODS RETURNED OR REPOSSESSED

29.-(1) Where a debtor sells or leases goods that are subject to a security interest and the goods are returned to or repossessed by:

- **(a) the debtor;**
- **(b) a transferee of chattel paper or a person having a security interest in an intangible resulting from the sale or lease of the goods;**
- **(c) a secured party who had a security interest in the goods at the time they were sold or leased or anyone claiming from or under him;**

the security interest mentioned in clause (c) attaches again if the obligation secured remains unfulfilled, and, if the security interest was perfected by registration at the time of the sale or lease and the registration is effective at the time of return or repossession of the goods, nothing further is required to continue the perfected status, but, in any other case, the secured party must take possession of the returned or repossessed goods or must register his security interest in them.

(2) A security interest in goods that attaches while the goods are in the possession of a buyer or a lessee of the debtor and that is perfected before the goods are returned or repossessed has priority over the security interest mentioned in clause (l)(c).

(3) Where a sale or lease creates chattel paper and the goods are returned or repossessed, the unpaid transferee of the chattel paper has a security interest in the goods, and, if the unpaid transferee took possession of the chattel paper in the ordinary course of business and for new value, the transferee's security interest has priority over the security interest mentioned in clause (l)(c) and has priority over a security interest in the returned or repossessed goods as after-acquired property which first attaches on return or repossession.

(4) Where a sale or lease creates an intangible and the goods are returned or repossessed, the secured party who had the security interest in the intangible has a security interest in the goods, but the security interest mentioned in clause (1)(c) has priority over such interest.

(5) A security interest asserted under subsections (3) and (4) is a perfected security interest in the goods when the security interest in the chattel paper or intangible was perfected, but it becomes unperfected 15 days after the day of return or repossession of the goods, unless the secured party perfects his interest in the goods by taking possession of them or registering his security interest in them before the expiry of that 15 day period.

Definitional Cross-References:

"chattel paper" - s.2(e)
"debtor" - s.2(k)
"goods" - s.2(s)
"intangible" - s.2(v)
"obligation secured" - s.2(aa)
"secured party" - s.2(kk)
"security interest" - s.2(nn)
"value" - s.2(qq)

1. Purpose of the Section
2. The Position of the Inventory Financer
3. The Position of the Chattel Paper Transferee
4. The Position of the Transferee of the Intangible
5. Priorities

1. Purpose of the Section

Section 29 has two main functions: (1) it deems security interests in goods to exist in circumstances where otherwise no such security interests would exist; and (2) it provides a set of priority rules to regulate priority disputes when more than one such security interest is deemed to exist in the goods.

When a seller of goods who has given a security interest in his inventory and his accounts sells an item of inventory and the buyer does not pay the full purchase price of the goods, an account or chattel paper will arise out of the sale (an account if the seller gives time to pay; chattel paper if the purchase is made under a secured instalment sales contract). The seller may then grant a security interest in the chattel paper (or sell it outright) to another secured party.[1] If the goods are returned to or repossessed by the seller or the transferee of the chattel paper, the question arises as to which of the parties (the inventory financer, the accounts financer if different from the inventory financer, and the transferee of the chattel paper) has a security interest in the returned or repossessed goods. If more than one does, it is necessary to determine which among them has first priority. Section 29 addresses both issues.

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[1] Under the Act a buyer of chattel paper is treated as a secured party for the purposes of the priority system. See ss.2(kk) and 2(nn)(i).

The structure and operation of section 29 is based on the premise that priority is not dependent on title. In other words, in the situation described in the preceding paragraph the resolution of a priority dispute between the inventory financer, the accounts financer and the transferee of the chattel paper will not turn on who has the legal title to the returned or repossessed goods. A title approach was used prior to implementation of the Act, but it did not always produce a consistent result.[2] Underlying section 29 are statutory policy choices designed to ensure consistency with other priority provisions of the Act, to reflect established commercial practices and to satisfy the reasonable expectations of the persons involved.

Nor does the outcome of a priority dispute under section 29 depend upon who among the seller, the inventory financer, the chattel paper transferee or the accounts financer happens to have repossessed the goods or accepted their return. Of course, as a practical matter, it is most unlikely that the goods will be returned to or repossessed by anyone other than the seller or the transferee of the chattel paper.

2. The Position of the Inventory Financer

When a commercial seller disposes of goods in the ordinary course of business, any security interest in those goods given by him to an inventory financer is "cut off" by section 30(1).[3] If, as is not uncommon, the goods are returned to or repossessed by the seller, it is possible that the security interest will not re-attach to the returned goods under the terms of the wholesale financing agreement. Section 29(1) deems that it does re- attach so long as the obligation secured by the original security interest remains unfulfilled. If a financing statement containing the necessary collateral description information is still in effect when the goods are returned or repossessed, nothing further need be done by the secured party to have a perfected security interest. If no such financing statement is in effect, alternative perfection steps must be taken if the deemed security interest is to be perfected. See section 29(1).

The fact that the security agreement and financing statement of the inventory financer are broadly enough worded to apply to the returned or repossessed goods as after-acquired property, does not take the inventory financer's security interest out of the operation of the priority scheme of the section. See section 29(3).

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[2] *Globe Financial Corporation, Limited* v. *Sterling Securities Corporation Limited*, [1932] 1 W.W.R. 347 (Sask. C.A.). Compare *Canadian Acceptance Corporation* v. *Frederick Parker Ltd.* (1971), 5 N.B.R. (2d) 751 (N.B.S.C.).

[3] A prior security interest is also "cut off" by section 30(2); however, in practice, it is unlikely that the issues addressed in section 29 will arise in the context of the types of transactions falling within section 30(2).

The re-attached inventory financer's security interest is not continuously perfected during the time that the goods are in the possession of the buyer or lessee. For priority purposes it is treated as a new statutory security interest that arises once the goods are returned or repossessed. Accordingly, any security interest in the goods created by the buyer or lessee that is perfected before the goods are returned or repossessed has priority over the inventory financer's security interest. See section 29(2). The priority position of the inventory financer's security interest vis-a-vis the chattel paper transferee and the account financer is discussed below.

3. The Position of the Chattel Paper Transferee

In the scenario set out above, the seller, after selling the inventory under a secured instalment sales contract (to simplify the analysis reference is made only to a sale, although what is said about a sale applies also to a lease) gives a security interest in (or sells outright) the contract (chattel paper) to a chattel paper transferee. At common law the transferee had two separate kinds of property interests: (1) a chose in action - the buyer's promise to pay contained in the contract, and (2) an interest in tangible personal property - title to the goods. However, under the Act chattel paper is treated as a category of collateral *sui generis*, and not as two different categories of collateral. See section 2(e). The transfer of the chattel paper does not transfer the title to the goods. In the first place, the seller does not have title to the goods to transfer; all he has is a security interest in the goods. In the second place, the transfer of the chattel paper by way of security involves the creation of a security interest and is not a transaction under which the transferee merely steps into the shoes of the seller. The transferee of the chattel paper obtains a security interest in the seller's security interest. Of course, an aspect of the chattel paper transferee's security interest is the right to assert the seller's security interest against the buyer in the event of default by the buyer under his security agreement with the seller.

However, when the goods are returned or repossessed, the right to enforce the seller's security interest against the buyer may be affected. The transferee of the chattel paper could enforce payment under the instalment sales contract if the return to or repossession by the seller or the transferee has not precluded the enforcement of such right. If the seller has accepted the return of or has repossessed the goods, the right of seizure of the goods from the buyer in which the chattel paper transferee has his security interest has been exercised and therefore is expended. While the chattel paper transferee's security interest in the chattel paper likely gives him the right to seize the goods from the seller, it does not follow that he has a security interest in the goods themselves. Accordingly, it is necessary for the law to give to him a security interest in the goods if he is to have any priority status with respect to them vis-a-vis other persons with security interests in the goods and the seller's trustee in bankruptcy. This is what section 29(3) does. The section provides that where the goods are returned or repossessed "the unpaid transferee of the chattel paper has a security interest in the goods".

Since the transferee's security interest is in a different category of collateral (i.e., it is in goods and not chattel paper) separate perfection of it is necessary. Section 29(5) provides a 15 day period of temporary perfection during which the chattel paper transferee must perfect his statutory security interest in the goods. This requirement of reperfection is important where the goods have been returned to or repossessed by the seller. There is a danger that the seller will re-sell the goods or grant a security interest in them to another secured party. Reperfection by registration will not give the chattel paper transferee priority over a buyer who purchases the goods in the ordinary course of the seller's business, since such a buyer is protected by section 30(1). However, it will give the chattel paper transferee priority over other non-ordinary course buyers and secured parties. If the chattel paper transferee repossesses the goods and retains possession of them, his statutory security interest in the goods is perfected by possession and nothing further need be done.

It may be argued that the returned or repossessed goods are proceeds of the transferee's security interest in the chattel paper. This will depend upon whether or not the return or repossession amounts to a "dealing with" the chattel paper. See section 2(ee). They may be proceeds if the goods are returned to the seller by the buyer as part of a transaction under which the sales contract is cancelled or modified in some way. However, if the seller or transferee has merely repossessed the goods upon the buyer's default, there would be no dealing with the chattel paper involved. In most cases, it should not make any practical difference if the goods are viewed as proceeds of the chattel paper, since the requirements of perfection as to the goods under section 28(3) parallel those of section 29(5).

In many situations the transferee of chattel paper is not a lender, but is a buyer of the chattel paper. In other words, the seller has divested himself of any right he has in the chattel paper through the transfer to the chattel paper buyer. It is important to decide whether or not section 29 was ever intended to apply to a situation in which the goods have been returned to or repossessed by the seller without the expressed or implied consent of the transferee. It can be argued that the actions of a seller in retaking possession of the goods amounts to an unlawful interference with the rights of the chattel paper transferee, and therefore is not a situation in which the law should place registration obligations on the transferee (particularly in situations where the transferee is unaware that the goods have been returned to the possession of the seller) or subject the transferee to the risk of loss of his interest in the goods to other parties, including the seller's trustee in bankruptcy.

Against this argument is the express wording of section 29. There is nothing to limit its application to a situation in which the goods are returned to or repossessed by the seller with the permission of the transferee. To limit the operation of section 29 to such situations would give it a very narrow scope and leave to the general priority sections the difficult priority issues that will arise when there has been return or repossession of the goods without the consent of the chattel paper transferee.

Further, it is not difficult for the chattel paper transferee to protect his interest. He need only register a financing statement using the seller's name as the registration criterion[4] and claim a security interest in the goods sold under the instalment sales contract that constitutes his chattel paper. If this is done at the time the chattel paper is purchased, the chattel paper transferee will not lose priority to the goods except through a sale by the seller in the ordinary course of business. There is a strong public policy bias in favour of protecting ordinary course buyers that should be applied in cases where goods originally in the hands of a seller as inventory are returned to him and sold as inventory.[5]

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[4] Of course, if the returned or repossessed goods are of a type that must be described by serial number and are held by the seller as consumer goods or equipment, it would be necessary to include a serial number description on the financing statement. This should not be a major difficulty since by definition, the chattel paper will involve a security interest in specific goods. See section 2(e).

[5] This public policy bias in favour of ordinary course buyers was reflected in pre-PPSA case law, although in the form of a strong presumption that the chattel paper transferee implicitly consents to the resale when he does nothing after he becomes aware that the goods have come back into the hands of the seller. See *Vancouver Motors Limited* v. *Lord* (1955), 17 W.W.R. 81 (B.C.S.C.). Compare *W.J. Allbutt & Company Limited* v. *Continental Guaranty Corporation of Canada Limited*, [1929] 3 W.W.R. 292 (B.C.C.A.).

The scope of the section has not been addressed by Canadian courts, nor has it been finally determined in the United States.[6]

4. The Position of the Transferee of the Intangible

Section 29(3) gives to a transferee of an intangible (usually an account) a security interest in the returned or repossessed goods when the original sale of those goods created the account. As with the transferee of chattel paper created by the sale, the transferee of the intangible must perfect his statutory security interest in the goods pursuant to section 29(5).

5. Priorities

As a result of section 29 an inventory financer, a chattel paper transferee and an assignee of an intangible all may have a security interest in the same returned or repossessed goods. It is therefore necessary to have some priority structure to establish the respective priority positions of the parties. This is not left to the regular priority rules of the Act. Section 29 contains its own priority rules.

Section 29(4) gives priority to the inventory financer over the assignee of the intangible. As a matter of policy this is justified since in practice, an assignee of an account is unlikely to look to returned or repossessed goods as further security for the obligation owing by the seller.

If an assignee of intangibles had taken a security interest in goods as proceeds of the intangibles, his priority position vis-a-vis the inventory financer *may* be different from that specified in section 29(4) if he registered his financing statement claiming the security interest in the intangibles and in the goods as proceeds before the inventory financer's financing statement is registered and if the return or repossession amounts to a dealing with the goods so as to make them proceeds. If the inventory financer holds a purchase money security in the goods, his interest would likely prevail if the requirements of section 34 have been met.

By necessary implication, the interest of the chattel paper transferee in the returned or repossessed goods has priority over that of the transferee of intangibles. See sections 29(3) and 29(4). Here again it is possible (but unlikely) for the transferee of intangibles to have priority by virtue of his having a perfected security interest in the goods as proceeds, but only if he has registered a financing statement claiming a security interest in the intangibles and in the goods as proceeds.

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[6] See *Osborn* v. *First National Bank of Holdenville*, 472 P. 2d 440 (Okla. 1970).

Section 29(3) gives priority to the transferee of the chattel paper over the inventory financer if the transferee takes possession of the chattel paper in the ordinary course of business and for new value. In this respect, section 29(3) provides the same priority regime with respect to the goods that section 31(5) provides where both the inventory financer and the chattel paper transferee are claiming the chattel paper.

The inventory financer cannot circumvent the operation of the priority rule of section 29(3) by claiming a security interest in the goods as proceeds of inventory. The goods can never be proceeds of the inventory financer's original collateral since the goods are the original collateral. Nor can he claim priority on the basis that his security interest attached automatically through the operation of an after-acquired property clause and not through the operation of section 29(1)(c).

As noted above, section 29(5) requires that the statutory security interest in the goods given by section 29(3) to the transferee of the chattel paper and by section 29(4) to the transferee of an intangible be perfected as a security interest in goods. The perfected status of the security interests in chattel paper and intangibles is not sufficient. Failure to perfect the statutory security interest in goods within the 15 day period provided in section 29(5) renders it unperfected thereafter and vulnerable to subordination to the claims of other secured creditors, transferees of the goods or the seller's trustee in bankruptcy.

In most situations it is the chattel paper transferee who is the secured party with the greatest stake in protecting his interest in the returned or repossessed goods. As a matter of practice, he should register a financing statement claiming a security interest in the goods which are the subject matter of the sale or lease that forms the basis of the chattel paper he is purchasing. In addition, he should take some policing measures to guard against the return of the goods to the seller and resale of the goods by the seller in the ordinary course of his business.

PRIORITY OF BUYER OR LESSEE OF GOODS

30.-(1) A buyer or lessee of goods sold or leased in the ordinary course of business of the seller or lessor takes free of any perfected or unperfected security interest therein given by or reserved against the seller or lessor or arising under section 29, whether or not the buyer or lessee knows of it, unless the secured party proves that the buyer or lessee also knows that the sale or lease constitutes a breach of the security agreement.

(2) A buyer or lessee of goods bought or leased primarily for personal, family, household or farming uses takes free of a perfected security interest in the goods if:

(a) he gives new value for his interest;

(b) he bought or leased the goods without notice of the security interest; and

(c) he receives delivery of the goods.

(3) Subsection (2) does not apply to a security interest in:

(a) a motor vehicle as defined in the regulations;

(b) fixtures; or

(c) goods whose purchase price exceeds $500 or, in the case of a lease, whose retail market value exceeds $500.

(4) For the purposes of subsections (1) and (2), a sale may be for cash, by exchange for other property or on credit, and includes delivering goods or documents of title under a pre-existing contract for sale, but does not include:

(a) a transfer in bulk;

(b) a transfer as security for, or in total or partial satisfaction of, a money debt; or

(c) any past liability.

(5) A buyer or lessee of goods takes free of a security interest that is temporarily perfected under subsection 26(2),

28(3) or 29(5), or a security interest, the perfection of which is continued under subsection 49(2) during any of the 15-day periods mentioned in that subsection, if:

(a) he gives new value for his interest;

(b) he bought or leased the goods without notice of the security interest; and

(c) he receives delivery of the goods.

Definitional Cross-References:

"document of title" - s.2(m)
"fixtures" - s.2(p)
"goods" - s.2(s)
"notice" - s.67(3)
"secured party" - s.2(kk)
"security agreement" - s. 2(mm)
"security interest" - s.2(nn)
"value" - s.2(qq)

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1. Purpose of the Section
2. Scope of the Section
3. What Constitutes a Sale in the Ordinary Course of Business?
4. Buyers and Lessees of Low Value Consumer and Farming Goods
5. Protection from Effects of Temporary Perfection

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1. Purpose of the Section

Section 30 states a special set of priority rules under which buyers of goods are given priority over *perfected* security interests (as well as unperfected security interests) in those goods. This should be contrasted with section 20(1)(e) which only gives a buyer or other transferee of goods priority over *unperfected* security interests. To simplify the analysis of section 30 reference is made only to a sale, although what is said about a sale applies also to a lease.

2. Scope of the Section

Section 30(1) ensures that a buyer who acquires an interest in goods from a seller under a transaction carried out in the ordinary course of the seller's business need not be concerned about prior security interests created by the seller in the goods he buys. The purpose of the provision is to avoid the disruption to commerce that would result if ordinary course buyers were required in every case to conduct a search of the Registry before buying goods. The fact that the buyer is aware of the existence of a security interest in the goods given by the seller does not deny him the protection of the section. Many buyers are aware that the wholesale or retail sellers with whom they deal may have given security interests in their inventory. It makes no commercial sense to place a buyer with such knowledge in the position of having to contact the secured creditor to get a release of the security interest in goods he intends to buy from the seller. However, if the buyer is aware that the seller is selling in violation of the security agreement between the seller and the secured party, he does not get the protection of the section.

The protection of ordinary course buyers at common law was effected by implying in the security agreement between the seller and the secured party a term allowing the seller to sell the goods in the ordinary course of business.[1] Section 30(1) goes further. It states a statutory priority rule that, unlike an implied term, cannot be displaced by an agreement between the secured party and the seller. Accordingly, even if the security agreement expressly prohibits sale of the goods, a buyer in the ordinary course of business takes free from the security interest unless he is aware of the prohibition in the security agreement.

Section 30(1) provides that an ordinary course buyer of goods takes free from any security interest in the goods *given by or reserved against the seller.* It does not allow the buyer to take free from a security interest in the goods given by someone other than the seller. Accordingly, if the goods are subject to a perfected security interest when they were acquired by the seller, the buyer cannot rely on section 30(1) as a basis for asserting priority over the holder of such interest. It may be argued that the words "reserved against" have the effect of giving the ordinary course buyer protection against such security interests since they are interests reserved against the seller and anyone else who acquires a subsequent interest in the goods. However, the Saskatchewan Court of Appeal interpreted this phrase to mean "a security interest *created by his seller*".[2] This is

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1. *Dedrick* v. *Ashdown* (1888), 15 S.C.R. 227.

2. *Camco Inc.* v. *Frances Olson Realty (1979) Ltd.*, [1986] 6 W.W.R. 258, at 271; 50 Sask. R. 161, at 169.

undoubtedly a correct interpretation. The words "reserved against" were included simply to ensure that the section would be read as applying to security interests in the form of conditional sales agreements which provide for the reservation of title by the seller until the full purchase price is paid.[3]

Given this interpretation, buyers of goods, particularly used goods, must take alternative measures to protect themselves even when they are buying from a seller who is in the business of selling such goods. If the goods fall within the categories of goods that must be described by serial number on a financing statement when taken as collateral, the buyer has an effective measure to protect himself. He can obtain a search result from the Registry using the serial number as his search criterion. This search result will disclose any security interest that is required to be registered by serial number. There is no equivalent measure to protect buyers of goods not within these categories. Since a security interest in such goods can be perfected by registration of a financing statement using the debtor name and not the serial number of the collateral as the registration criterion, it may be impossible for the buyer to discover the existence of the security interest through a search of the Registry unless he knows the name of all persons who had interests in the goods prior to the time that the seller acquired them.

There is one situation where even a search of the serial number of collateral will not reveal a perfected security interest. This is displayed in the following example. A secured party (SP) takes a security interest in a dealer's (D) inventory of automobiles. The security interest is perfected by registration. Serial numbers need not be registered because the goods are held by D as inventory (see section 5(1)(i) of the Regulations). In most cases, a sale of an automobile will occur in the ordinary course of business of D and the buyer will therefore take free of SP's security interest by virtue of section 30(1). But if the sale does not take place in the ordinary course of business, section 30(1) will have no application and the buyer (B) will take his interest subject to SP's security interest. If B then proposes to sell the automobile or to grant a security interest in it to another person, that person will be unable to rely upon the Registry. A serial number search will not reveal SP's security interest, which is nevertheless perfected and entitled to priority under the Act.

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[3] Similar language is used in the definition of "purchase-money security interest" contained in s.2(gg).

3. What Constitutes a Sale in the Ordinary Course of Business?

It has recently been established by the Saskatchewan Court of Appeal[4] that in order for the buyer to have the protection of section 30(1), it is not sufficient that a contract of sale of goods has been entered into and that the seller has in his possession goods of the contract description at the time the secured party asserts his security interest. In order for the section to operate so as to give priority to the buyer, it is necessary that property in the goods pass to the buyer. The rules for determining whether or not property has passed are those set out in The Sale of Goods Act.[5]

The Saskatchewan Court of Appeal has described a sale "in the ordinary course of business" as including a sale to the public at large, of the type normally made by the vendor in a particular business where the basic business dealings between buyer and seller are carried out under normal terms and consistent with general commercial practice. It does not include private sales between individuals.[6] It can, however, include sales between sellers who ordinarily sell not to each other but to the general public.[7] Although section 30 will in practice apply primarily to security interests in inventory, the Saskatchewan Court of Appeal has held that it is not as a matter of law so limited.[8]

A similarly worded provision in the Ontario PPSA was held to apply where the sale appears to a reasonable buyer to be in the ordinary course of business of the seller even though in fact the seller is not in the business of selling goods of that kind.[9] While this interpretation provides the maximum protection for buyers, it is difficult to justify it on the wording of the section.

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[4] *Royal Bank of Canada* v. *216200 Alberta Ltd.*, [1987] 1 W.W.R. 545, 51 Sask. R. 146 (Sask. C.A.).

[5] R.S.S. 1978, c. S-1, ss. 18-20.

[6] *Royal Bank of Canada* v. *216200 Alberta Ltd.*, *supra*, footnote 4, at 552 (W.W.R.), 151 (Sask. R.). See also *Fairlane Boats Ltd.* v. *Leger* (1980), 1 P.P.S.A.C. 218 (Ont. H.C.).

[7] *Ford Motor Credit Co. of Canada Ltd.* v. *Centre Motors of Brampton Ltd.* (1983), 38 O.R. (2d) 516 (Ont. H.C.).

[8] *Camco Inc.* v. *Frances Olson Realty (1979) Ltd.*, *supra*, footnote 2, at 272-73 (W.W.R.), 151 (Sask. R.).

[9] *Fairlane Boats Ltd.* v. *Leger*, *supra*, footnote 6.

4. Buyers and Lessees of Low Value Consumer and Farming Goods

Section 30(2) provides a much broader measure of protection to buyers and lessees than does section 30(1), but does so in a much narrower context. The section gives protection to buyers against all prior security interests whether created by the seller or anyone else. However, it applies only to sales of goods (other than motor vehicles or fixtures) acquired for personal, family, household or farming uses which have a purchase price of $500.00 or less. The seller need not be in the business of selling goods of the kind purchased and the sale need not be in the ordinary course of business. Accordingly, unlike section 30(1), section 30(2) applies to private sales. However, in order to get the protection of the section, the buyer must: (i) have given new value;[10] (ii) be without notice of the prior security interest at the time he bought the goods; and (iii) take delivery of the goods. As to what constitutes notice, see section 67(3).

5. Protection from Effects of Temporary Perfection

There are situations in which a security interest in goods is temporarily perfected without registration and without the secured party taking possession of the collateral. The purpose of section 30(5) is to give to buyers the ability to rely on the information available from the Registry when determining whether or not the goods offered to them for sale are subject to any prior security interests. Without section 30(5), buyers would always run the risk when buying goods that the goods are subject to a temporarily perfected security interest.

In order to get the protection of the section, the buyer must: (i) have given new value;[11] (ii) be without notice of the prior security interest at the time he bought the goods; and (iii) must take delivery of the goods. As to what constitutes notice, see section 67(3). Similar protection is given to good faith buyers who acquire in Saskatchewan goods subject to foreign security interests that are not registered in the Registry. See section 5(2).

Sections 21 and 34(1) give "grace periods" for the registration of purchase money security interests. If a purchase money security interest is perfected within 15 days from the date that the debtor obtains possession of the goods, the security interest has priority over any execution or other judgment enforcement measure taken against the goods while they are in the hands of the debtor and over any prior security taken in the goods. However, the effect of these sections is to give the special purchase money priority over only those interests mentioned in the sections; and the interest of a person who buys the goods from the debtor is not included. Accordingly, if such buyer acquires his interest before the purchase money security interest is registered, he has priority over the purchase money security interest, since vis-a-vis him the purchase money security interest is unperfected. See section 20(1)(e).

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[10] Section 30(4) indicates that the price cannot be the canceliation of a pre-existing debt owed by the seller.

[11] See footnote 10.

PRIORITY OF HOLDERS OR PURCHASERS OF MONEY, INSTRUMENTS, SECURITIES, DOCUMENTS OF TITLE, CHATTEL PAPER

31.-(1) A holder of money has priority over any security interest in it perfected under section 25 or temporarily perfected under subsection 28(3) if the holder:

(a) acquired the money without notice that it was subject to a security interest; or

(b) was a holder for value, whether or not he acquired the money without notice that it was subject to a security interest.

(2) Notwithstanding subsections (1) and (3), a creditor who receives money or an instrument drawn or made by a debtor and delivered in payment of a debt owing to him by that debtor takes free from a security interest in the money or instrument drawn or made by the debtor whether or not the creditor has notice of the security interest.

(3) A purchaser of an instrument or a security has priority over any security interest in the instrument or security perfected under section 25 or temporarily perfected under section 26 or subsection 28(3) if the purchaser:

(a) gave value for his interest;

(b) acquired the instrument or security without notice that it was subject to a security interest; and

(c) took possession of the instrument or security.

(4) A holder to whom a negotiable document of title has been negotiated has priority over any interest in the negotiable document of title that is perfected under section 25 or temporarily perfected under section 26 or subsection 28(3) if the holder:

(a) gave value for the document of title; and

(b) took the negotiable document of title without notice that it was subject to a security interest.

(5) A purchaser of chattel paper who took possession of it in the ordinary course of business and who gave new value for it has priority over:

(a) any security interest that, in the case of chattel paper claimed as original collateral, was perfected under section 25 or any security interest in it as proceeds of equipment or consumer goods, if the purchaser acquired the chattel paper without notice that it was subject to a security interest;

(b) any security interest in it as proceeds of inventory, whether or not the purchaser has notice of the security interest.

Definitional Cross-References:

"chattel paper" - s.2(e)
"collateral" - s.2(f)
"consumer goods" - s.2(h)
"creditor" - s.2(j)
"debtor" - s.2(k)
"document of title" - s.2(m)
"equipment" - s.2(n)
"instrument" - s.2(u)
"inventory" -s.2(w)
"money" - s.2(z)

"notice" - s.67(3)
"proceeds" - s.2(ee)
"purchaser" - s.2(hh)
"security" - s.2(ll)
"security interest" - s.2(nn)
"value" - s.2(qq)

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1. Security Interests in Money
2. Payment of Unsecured Creditors
3. Purchasers of Instruments or Securities
4. Holders of Negotiable Documents of Title
5. Transfers of Chattel Paper

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1. Security Interests in Money

It is possible under the Act to take a security interest in money. This occurs when the security agreement specifies money as an item of original collateral, when a security interest is taken in all of the debtor's present and after-acquired property and the debtor acquires money, or when a debtor acquires money as proceeds of other property in which a security interest has been taken.

It is possible to perfect a security interest in money without the secured party taking possession of it. Under section 25 a security interest in any type of collateral may be perfected by registration. Under section 28(2) a security interest in cash proceeds (see section 2(ee)) is perfected without registration or possession by the secured party so long as the security interest in the original collateral is perfected; and a security interest in cash proceeds left in the hands of the debtor is temporarily perfected under section 28(3) even though the security interest in the original collateral was perfected by possession.

Provincial legislation cannot interfere with the negotiability of money. As a result, a person holding a security interest in money cannot claim it *in specie* from a person who has taken possession of it under circumstances that amount to negotiation of it. Further, a transfer of possession of currency transfers the legal title to it. However, if the transferee of the money is aware that another person has an interest in the money when he acquires it, he can be liable in tort for interference with those rights and may be required to surrender the money if it remains in his possession.[1] Sections

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[1] R.M. Goode, "The Right to Trace and its Impact in Commercial Transactions - I" (1976), 92 *Law Q. Rev.* 360, at 367-78.

31(1) and 31(2) prescribe the extent to which security interests can be asserted against holders of money who acquired it in circumstances that do not amount to negotiation.

Section 31(1) contemplates a situation in which a security interest has been taken in money left in the hands of the debtor. The security interest is perfected by registration pursuant to section 25 or is temporarily perfected pursuant to section 28(3). If the debtor transfers the money to someone who takes it as a gift but without notice that it is collateral under the security agreement, the interest of the transferee in the money has priority over the rights of the holder of the security interest. If the debtor transfers the money to someone who takes it for value, the fact that the transferee has notice of the security interest in it does not prevent him from having priority to it over the interest of the secured creditor.

2. Payment of Unsecured Creditors

Section 31(2) empowers a debtor to meet the claims of other creditors in cases where the debtor has given a security interest in property typically used to pay such creditors. This power is equivalent to that which a debtor had under an uncrystallized floating charge. As a result of the section, a secured party with a perfected security interest in money or instruments of the debtor has no right to such money or instruments in the hands of a creditor who obtained it by voluntary transfer by the debtor, even though the recipient of the money or instruments had knowledge of the security interest when he acquired it. In order for the creditor who has been given an instrument in payment by the debtor to have the protection of the section, the instrument must be one made or drawn by the debtor. This will usually involve the debtor drawing a cheque on his deposit account and tendering it in payment to the creditor.

The subsection does not extend to give priority to a creditor who causes the money or instruments to be seized under a judgment enforcement measure or to a creditor claiming a right of set-off against a debt owing by him to the debtor.

3. Purchasers of Instruments or Securities

Section 31(3) recognizes the free transferability of instruments and securities. As is the case with money, a security interest in an instrument or security may be perfected by registration or by temporary perfection. Quite apart from constitutional problems relating to instruments that fall within the federal Bills of Exchange

Act,[2] it is commercially unacceptable to place ordinary course transferees of instruments or securities in the position of having to conduct a search of the Registry before dealing with this type of property. The effect of the section is to give priority to a transferee of an instrument or a security who has acquired physical possession of it for value and without notice that it is subject to a security interest. As to what constitutes notice, see section 67(3).

An "instrument" to which the section applies is defined in section 2(u) to include not only the traditional types of negotiable instruments to which the Bills of Exchange Act applies, but as well any other "writing" that evidences a right to payment of money and is of a type that in the ordinary course of business is transferred by delivery with any necessary endorsements or assignment. These other types of instruments could be described as being something midway between a negotiable instrument and a pure intangible. They need not be negotiable in the sense that the transferee may acquire a better title than that of the transferor. However, they must be such as to be recognized in the commercial community as evidencing the right to collect the debt they represent or as being a method through which that right can be transferred. Accordingly, an instrument is more than just a written record of a debt.

A "security" to which the section applies is defined in section 2(11) to include not only shares but also debt obligations of corporations in the form of bonds or debentures. In some situations a document may be both an "instrument" and a "security", though this will not always be the case. In order for a written, transferable debt obligation to be a "security", it must have been issued by a corporation and must be in one of the more traditional forms such as a "bond, debenture or the like". No similar limitation is placed on the meaning of "instrument".

It is to be noted that it is a "purchaser" of an instrument or a security that gets the protection of the section if the conditions prescribed in it are met. A "purchaser" includes a person who takes a security interest in the property "purchased". See sections 2(ff) and 2(hh). Accordingly, a secured party who perfects his security interest in an instrument or security by taking possession of it will have priority over a registered security interest in it so long as the other requirements of section 31(3) have been met. This is one instance in which perfection by registration is less effective than perfection by possession.

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[2] R.S.C. 1970, c. B-5.

4. Holders of Negotiable Documents of Title

Negotiable documents of title to goods are transferred by delivery in the ordinary course of business. The holder of the document of title is prima facie entitled to possession of the goods the document represents if he is the person to whom the document has been endorsed.

One method of perfecting a security interest in goods is to perfect a security interest in a negotiable document of title issued in respect of the goods. See section 27(1)(d). A security interest in a negotiable document of title can be perfected by registration. In order to preserve the free transferability of negotiable documents of title, it is necessary to recognize the higher priority claim of transferees of negotiable documents of title over secured creditors who have registered security interests in such documents. This is provided for in section 31(4).

The term "document of title" is defined to include both negotiable and non- negotiable documents of title. The only document of title recognized as being "negotiable" is the bill of lading. Since there is no legislation other than The Sale of Goods Act[3] and The Factors Act[4] in Saskatchewan that extends the common law in this respect, the bill of lading is the only "negotiable" document of title under Saskatchewan provincial law. A negotiable bill of lading is not negotiable in the sense that the instrument can give to a transferee a better title than that possessed by the transferor. The term "negotiable" is used to indicate that a property in the goods to which the bill relates can be transferred by endorsement and delivery of the document to the transferee. This cannot be done with a non-negotiable or "straight" bill of lading which is not drawn "to order" but to a named person only.

Section 31(4) does not deal with a priority competition between a secured party with a perfected security interest in goods and a secured party with a possessory security interest in a negotiable document of title to those goods. See sections 27 and 35. Nor does it deal with conflicting claims of a secured party with a security interest in goods and a non-security transferee of a negotiable document of title to those goods. It applies only to a priority dispute involving a secured party with a security interest in a negotiable document of title perfected by registration or temporarily perfected and a holder (whether as buyer or as secured party) of an interest in the negotiable document of title who acquired it in the circumstances described in the section.

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[3] R.S.S. 1978, c. S-1, s.2(1)(e).

[4] R.S.S. 1978, c.F-1, s.2(1)(a).

As is the case with instruments, securities and chattel paper, a security interest in a document of title perfected by possession (i.e., the secured party becoming a holder under the circumstances prescribed by section 31(4)) is given priority over a prior registered security interest in the same document (but not over a security interest registered in the goods covered by it). Perfection by possession is in this context a "better" method of perfection.

5. Transfers of Chattel Paper

Section 31(5) provides special priority rules for competing interests in chattel paper. The legal concept of "chattel paper" had no direct counterpart in pre-PPSA law. In pre-PPSA commercial practice, the term chattel paper usually referred to a conditional sales contract. Accordingly, chattel paper involved two separate rights: (1) a security interest (legal title) in the goods sold under a conditional sales contract (i.e., a property interest recognized by the common law rules of personal property); and (2) the buyer's debt obligation arising out of the contract (a chose in action recognized by equity and statute). The transfer of chattel paper by the conditional seller resulted in a transfer of the legal title to the goods and the assignment of the chose in action.

The provisions of the Act dealing with chattel paper have been designed to reflect commercial usages rather than to pre-PPSA legal principles. Accordingly, the Act treats chattel paper with its two components as a single type of collateral subject to a set of priority rules not applicable to the separate component parts of chattel paper. The term "chattel paper" is defined in section 2(e) as being a type of collateral composed of "a monetary obligation and a security interest in or lease of specific goods". The account component of the chattel paper (the monetary obligation) has no separate legal existence for the purpose of priority rules of the Act. See section 2(b). For example a security interest in accounts of a debtor will not attach to the monetary obligation involved in the chattel paper created by that debtor.

The definition of chattel paper is broad enough to cover secured instalment sales contracts (formerly conditional sales), leases (including security leases, true leases and deemed security leases) and secured lending transactions. Note, however, that the security interest must be in specific goods or specific goods and accessions. As to what constitutes specific goods see section 2(oo). A security agreement that provides for a security interest in after-acquired property cannot be chattel paper.

A security interest in chattel paper does not involve the transfer of the conditional seller's, lessor's or lender's title to the goods. It involves a security interest in the obligation of the buyer, lessee or borrower in respect of the goods, and in the seller's or lender's security interest in the goods or in the lessor's ownership. Complete protection of a chattel paper transferee's interest may require double perfection: perfection of the underlying security interest (arising out of the contract between the seller and the buyer, the lessor and lessee or the lender and borrower) and perfection of the security interest in the chattel paper. This is illustrated in the following scenario: A sells an automobile to B under a secured instalment sales contract. A has a security interest which must be perfected to be protected against buyers, other secured parties and unsecured parties dealing with B, and as against B's trustee in bankruptcy. A then gives a security interest in (or sells) the instalment sales contract (chattel paper) to C who perfects his security interest in it in order to protect his interest against buyers, other secured and unsecured parties dealing with A, and as against A's trustee in bankruptcy. The perfection of C's security interest in the chattel paper alone does not perfect the security interest in the automobile. If B sells the automobile to D when the security interest in it is unperfected, C is left with nothing except the obligation of B, which is likely to be valueless, and any recourse he may have against A. Double perfection is not necessary when the contract which is the basis of the chattel paper is a true lease which has a term of one year or less.

The Act treats a sale of chattel paper as a deemed security interest for the purposes of perfection, priority and conflict of laws rules. See sections 2(nn)(i) and 3(b). Section 31(5) applies to a "purchaser" of chattel paper. A purchaser can be a buyer or a secured party. See sections 2(ff) and 2(hh).

The purpose of section 31(5) is to provide rules for determining the relative priority positions of two or more security interests in chattel paper. As is the case with instruments and negotiable documents of title, possession is a more effective method of perfecting a security interest in chattel paper. In this respect, chattel paper is treated as a document of title to the rights contained in the sale or leasing contract that underlies the chattel paper. Under section 31(5) a registered security interest in chattel paper taken as original collateral or an interest in it as proceeds of equipment or consumer goods is subordinate to a purchaser of it who: (1) gives "new value";[5] (2) took possession of the chattel paper in the ordinary course of business; and (3) did so without notice that the chattel paper was subject to a registered security interest. As to what constitutes notice, see section 67(3).

Where the registered or temporarily perfected security interest in the chattel paper is based on a claim to the chattel paper as proceeds of inventory, the purchaser has priority even though he has notice of the prior security interest. This feature of section 31(5) reflects a policy choice designed to accommodate business practice. The effect of the provision is to give to a seller, lessor or lender the power to dispose of the chattel paper he creates by the sale of inventory where the financer of that inventory has a security interest in the chattel paper as proceeds of the inventory. The fact that the inventory financer's interest is perfected by registration or that the purchaser of the chattel paper knows of the existence of that interest does not affect this power. The ability of sellers, lessors or lenders to deal with the chattel paper they generate was considered to be of greater importance than the protection of the claims of inventory financers right to protect a proceeds security interest in chattel paper. An inventory financer who wishes to ensure priority with respect to chattel paper that is proceeds of the inventory in which he has a security interest can arrange to take possession of the chattel paper.

The question will inevitably arise as to whether or not an inventory financer can bring himself within section 31(5)(a) (thereby attaining priority over a chattel paper purchaser who has notice of the inventory financer's interest in the chattel paper) simply by registering a financing statement claiming the chattel paper as original collateral and not as proceeds. It is doubtful that this tactic will succeed. If in fact the chattel paper is proceeds of inventory, section 31(5)(b) is applicable. It would be against the spirit and purpose of the section to give precedence in such a situation to section 31(5)(a) over section 31(5)(b).

Sometimes purchasers of chattel paper prefer to leave chattel paper in the hands of the seller, lessor or lender. In order to reduce the risk that this entails, each chattel paper contract is stamped with the name of the purchaser and a financing statement relating to the purchaser's interest is registered. If this is done, the purchaser has complete protection (unless he is claiming the chattel paper as proceeds of inventory) since the stamping gives notice of his interest to any other chattel paper purchaser, thereby preventing such purchaser from bringing himself within section 31(5)(a).

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[5] New value means additional consideration and not just the cancellation or reduction of a debt or past obligation of the transferee of the chattel paper.

PRIORITY OF LIENS

32. Where a person in the ordinary course of business furnishes materials or services with respect to goods that are subject to a security interest, any lien that he has in respect of such materials or services has priority over a perfected security interest unless the lien is given by an Act that provides that the lien does not have such priority.

Definitional Cross-References:

"goods" - s.2(s)
"person" - s.2(cc)
"security interest" - s.2(nn)

Section 22 is an exception to the general rule in section 4(a) that the Act does not apply to a lien given by rule of law for the furnishing of goods, services or materials. The section gives priority to a lien on goods over a security interest in the goods if the lien arose as a result of the furnishing of materials or services in connection with the goods in the ordinary course of business. Only if the lien arises under legislation that provides to the contrary is this priority rule inapplicable.

The section does not require that the lien be possessory. Accordingly, since a non-possessory lien arising under The Garage Keepers Act[1] exists without any need for registration for a period of up to forty-five days after the garage keeper gives up possession of the motor vehicle, a lien created under that statute would have priority over a security interest in the motor vehicle taken before or during the forty-five day period. See also section 7(2) of The Garage Keepers Act. However, after the expiry of the forty-five day period, the non-possessory lien expires unless it has been registered. Any security interest in the motor vehicle would thereafter have priority over the claim of the garage keeper unless the motor vehicle has been returned to his possession or is viewed as being in his constructive possession.

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[1] R.S.S. 1978, c. G-13.

ALIENATION OF RIGHTS OF DEBTOR

33. The rights of a debtor in collateral may be transferred voluntarily or involuntarily notwithstanding a provision in the security agreement prohibiting transfer or declaring a transfer to be a default, but no transfer prejudices the rights of the secured party under the security agreement or otherwise, including the right to treat a prohibited transfer as an act of default.

Definitional Cross-References:

"collateral" - s.2(f)
"debtor" - s.2(k)
"default" - s.2(1)
"secured party" - s.2(kk)
"security agreement" - s.2(mm)

Since the creation of a security interest does not involve a transfer of title or ownership to the secured party, the debtor remains the owner of the collateral. Section 33 recognizes a debtor's power to dispose of his interest in the collateral. It also recognizes the right of others, such as judgment creditors, to have the debtor's interest in the collateral seized under judgment enforcement proceedings. The fact that a transferee of the debtor's rights or the seizing creditor is aware of a contractual prohibition against transfer does not affect this position.

While a secured party cannot prevent voluntary or involuntary transfer of the debtor's interest in the collateral, a clause in the security agreement which provides that such a transfer amounts to default under the agreement is valid. Accordingly, a transfer of the collateral by the debtor or seizure of it by his creditors can trigger default and give to the secured party the right to proceed under Part V.

PRIORITY OF PURCHASE-MONEY SECURITY INTEREST

34.-(1) Subject to section 28, a purchase-money security interest in:

(a) collateral or its proceeds, other than intangibles or inventory, that is perfected within 15 days after the day the debtor obtains possession of the collateral; or

(b) an intangible or its proceeds that is perfected within 15 days after the day the security interest in the intangible attaches;

has priority over any other security interest in the same collateral or its proceeds given by the same debtor.

(2) Subject to section 28 and subsection (4) of this section, a purchase-money security interest in inventory or its proceeds has priority over any other security interest in the same collateral given by the same debtor if:

(a) the purchase-money security interest in the inventory is perfected at the time the debtor receives possession of it; and

(b) the purchase-money secured party serves a notice on any person who has registered a financing statement or security agreement covering the same type or kind of collateral, unless the purchase-money secured party registers his interest before that time, in which case the notice shall be served on secured parties who have registered financing statements or security agreements covering the same type or kind of collateral of the debtor before registration by the purchase-money secured party.

(3) The notice required in subsection (2) shall:

(a) contain a statement that the person giving the notice has acquired or expects to acquire a purchase-money security interest in inventory of the debtor and its proceeds and a description of the inventory and its proceeds according to type or kind; and

(b) be served at any time within a period of two years

before the debtor receives possession of the collateral.

(4) No purchase-money security interest in proceeds of inventory has priority over a security interest in accounts given for new value where a financing statement relating thereto is registered before the purchase-money security interest is perfected or a financing statement relating thereto is registered.

(5) A non-proceeds purchase-money security interest has priority over a purchase-money security interest in proceeds under subsections (1) and (2) in the same collateral if the non-proceeds purchase-money security interest is perfected at the time the debtor obtains possession of the collateral or within 15 days thereafter.

(6) A perfected security interest in crops or their proceeds, given, not more than three months before the crops become growing crops by planting or otherwise, to enable the debtor to produce the crops during the production season, has priority over an earlier perfected security interest to the extent that the earlier interest secures obligations that were contracted more than six months before the crops become growing crops by planting or otherwise, even though the person giving the consideration has notice of the earlier security interest.

Definitional Cross-References:

"account" - s.2(b)
"collateral" - s.2(f)
"debtor" - s.2(k)
"financing statement" - s.2(o)
"intangible" -s.2(v)
"inventory" - s.2(w)
"person" - s.2(cc)
"proceeds" - s.2(ee)
"purchase-money security interest" - s.2(gg)
"secured party" - s.2(kk)
"security agreement" - s.2(mm)
"security interest" - s.2(nn)
"value" - s.2(qq)

SECTION 34

1. Purchase-money Security Interest: Policy and Definition
2. The Extent of the Purchase-money Priority
3. Two or More Purchase-money Security Interests in the Same Collateral
4. Security Interests in Accounts as Proceeds
5. Priority of Non-proceeds Purchase-money Security Interests
6. Security Interests in Crops
7. The Concept of Purchase-money Security Interest used in Other Provincial Legislation

1. Purchase-money Security Interest: Policy and Definition

The concept of a "purchase-money security interest" is an important part of the priority system of the Act. The Act gives a special priority status (sometimes referred to as a superpriority) to a secured creditor who has provided credit through which the debtor acquires the collateral in which the secured creditor has taken a security interest. The policy underlying the special status of such creditors is not difficult to identify or to justify. A creditor who has provided the credit needed by the debtor to acquire the collateral should be given priority to that collateral because without this priority he would be unwilling to grant secured credit in situations where the debtor has given a prior security interest which would attach to the collateral under an after-acquired property clause. A corollary of this is that the purchase-money priority permits the debtor to obtain secured credit from additional sources in situations where he has already given a broadly based non-purchase-money security interest in his present and after-acquired property. This is an important feature of the system because it is very easy for a creditor to take and perfect a security interest in all of a debtor's present and after-acquired property.

Section 2(gg) of the Act defines a "purchase-money security interest" as:[1]

(i) a security interest that is taken or reserved by a seller, lessor

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[1] Section 2(gg) includes in the definition "the interest of a lessor of goods under a lease for a term of more than one year" (as defined in section 2(y)) and "the interest of a person who delivers goods to another person under a consignment" (as defined in section 2(g)). Leases for a term of more than one year and consignments are two of the transactions that are deemed to be security agreements for the purposes of the perfection, priority and conflicts provisions of the Act. The roles that a lessor and a consignor play as suppliers of goods are such as to require that they be treated as purchase-money security interests.

> or consignor of personal property to secure payment of all or part of its sale or lease price.

A security interest taken under an instalment sales contract by a seller must be taken in the goods sold and must secure the purchase price of those goods in order to qualify. If the contract provides for a credit charge over and above the price at which the goods were offered for cash, it is possible that the amount of the credit charge is not secured by the purchase-money security interest since it is not "part" of the "sale price" of the goods.[2] Also within the scope of the definition is:

> (ii) a security interest that is taken by a person who gives value for the purpose of enabling the debtor to acquire rights in or to the personal property, to the extent that the value is applied to acquire such rights.

There is an ambiguity in this part of the definition. It is not clear from the definition that the security interest must be taken in the property that is acquired by the value given. However, given the obvious policy of the Act as it applies to purchase-money security interests, there can be little doubt that the section should be read as follows: "a security interest that is taken in personal property by a person who gives value for the purpose of enabling the debtor to acquire rights in or to the personal property....".

In order for a lender to have a purchase-money security interest he must establish two things. First he must establish that the loan was made for the purpose of enabling the debtor to acquire the collateral. While it is wise to state in the security agreement that the loan is to permit the debtor to purchase the collateral, it is not a *sine qua non* of the purchase-money security interest that this be done. Other evidence of the intentions of the parties is admissible.[3] Secondly, the lender must show that the money was in fact used for this purpose.[4] This may be difficult in cases where the debtor obtained money from the lender and mixed it with money from other sources (i.e., deposits it into an account containing a credit balance or to which other credits are made as a result of later deposits). There is no way of determining whether it was the money loaned or the other credits that was used to purchase the collateral. The question whether or not a purchase-money security interest has been taken is ultimately a factual determination. Although a designation of the security interest as a "purchase-money security interest" in the security agreement and a claim to such an interest in the financing statement (by typing "M" in the box on line J) is evidence of the purpose of the loan, it must also be demonstrated that value was in fact advanced and that it was actually used to acquire the collateral.

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[2] See *Canadian Imperial Bank of Commerce* v. *Marathon Realty Co. Ltd.* (1986), 47 Sask. R. 237, at 240 (Q.B.).

[3] *Royal Bank of Canada* v. *Pioneer Property Management Ltd.*, [1987] 2 W.W.R. 445, 53 Sask R. 228 (Q.B.).

[4] *Canadian Imperial Bank of Commerce* v. *Marathon Realty Co. Ltd.*, *supra*, footnote 2, at 239.

It remains to be settled by Saskatchewan courts whether or not a secured loan used to pay out all or part of an extant security interest can be the basis of a purchase-money security interest. Saskatchewan courts have given contradictory rulings on this question.[5] On principle and on the wording of section 2(gg), there would appear to be no reason why it should not. If the money was loaned for and in fact was used to eliminate or reduce the already existing security interest in the collateral, the requirements of the section would be met. The "rights in or to the" collateral which the debtor acquired would be the rights the debtor acquired by virtue of the elimination or reduction of the security interest in the collateral. If the debtor had sold the property and then used the loan to buy it back, there could be little doubt that the lender's security interest in the property would be a purchase-money security interest.

2. The Extent of the Purchase-Money Priority

The general priority rule applicable to conflicts among security interests in the same collateral is prescribed in section 35. Under this rule priority goes to the secured party who has first registered a financing statement, has taken possession of the collateral (if it is of a kind that can be reduced to possession) or has obtained temporary perfection of his security interest. Sections 34(1) and 34(2) state exceptions to the first in time rule of section 35.

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[5] See *Newman* v. *E.M. Neon Signcrafters Inc.* (1985), 33 Sask. R. 177 (Sask. Q.B.) and *Johnson* v. *Bank of Nova Scotia* (1986), 41 Sask. R. 292 (Q.B.). Both cases dealt with the "buy out" of prior purchase-money security interests. However, since the conclusion that a lender can acquire a purchase-money security interest by financing the elimination or reduction of a prior security interest in the collateral does not depend on the assumption that the lender is taking an assignment of the earlier security interest, it should not matter that the prior security interest is not a purchase-money security interest.

The basic scenario to which sections 34(1) and 34(2) applies is one in which a secured party (SPI) has registered a financing statement claiming an interest in property of the debtor of a specified type or kind or in all of the debtor's present and after-acquired property created under a security agreement with the debtor (D) (or has otherwise taken the necessary steps for perfection of his interest). D later obtains credit from another secured party (SPII) for the purposes of purchasing property of a kind that falls within the scope of SPI's security interest. Typically, SPI is a bank or other lending institution that provides medium term credit facilities on a revolving basis. SPII is a supplier of inventory or equipment or a financing institution that provides inventory or equipment financing services.

When the property acquired by D with the loan or credit provided by SPII is equipment, consumer goods or intangibles, section 34(1) gives first priority to SPII over SPI if SPII perfects his security interest in the property not later than fifteen days after D obtains possession[6] of goods, or in the case of a security interest in the intangibles not later than fifteen days from the date that the security interest attaches. There is no requirement that SPII be without notice of SPI's prior security interest. Nor is there any requirement that SPI notify SPII of his intention to supply purchase-money credit to D. SPII's priority extends to the proceeds of the original collateral in which SPII has a purchase-money security interest. SPII's security interest in the proceeds has priority so long as D owes any money to SPII under the security agreement even if the specific obligation relating to the item of original collateral the sale of which produced the proceeds has been discharged.[7]

When the property in which SPII has his purchase-money security interest is inventory, somewhat different conditions must be met if SPII is to have priority over SPI. These different requirements are necessary in order to protect SPI who may make additional advances to D on the mistaken assumption that such advances will be secured by a first priority security interest in the new inventory acquired by D. SPII must perfect his security interest before D obtains possession of the collateral, and must give to SPII within a period of two years prior to the time D obtains possession of the collateral a notice of his intention to acquire a purchase-money security interest in D's inventory and proceeds. See section 34(2). Failure on the part of SPII to meet the requirements of section 34(2) results in loss of the special priority given to purchase-money security interests. This is so even though SPI did not make further advances to D after SPII took his security interest.[8]

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[6] As to what constitutes possession by the debtor see the commentary accompanying section 21.

[7] See *Chrysler Credit Canada Ltd.* v. *Royal Bank of Canada*, [1986] 6 W.W.R. 338, 50 Sask. R. 216 (Sask. C.A.). For an analysis of this decision, see R.C.C. Cuming, "Judicial Treatment of the Saskatchewan Personal Property Security Act" (1986-87), 51 Sask. Law Rev. 129, at 155-59.

3. Two or More Security Purchase-money Security Interests in the Same Collateral

It is possible to have two purchase-money security interests in the same collateral. For example, a person (D) wanting to buy an automobile may obtain a loan from a bank (SPI) sufficient for the down payment and obtain credit from the seller (SPII) for the balance of the purchase price. If D gives to both SPI and SPII a security interest in the automobile, each has a purchase-money security interest since each has supplied value to enable D to acquire rights in the automobile.

Alternatively, D may have obtained loans from SPI and SPII (both commercial lenders) the total of which is sufficient to pay the purchase price of the automobile. Again, both SPI and SPII will have purchase-money security interests in the automobile if their respective security agreements provide for a security interest in the automobile. There is nothing in section 34 that provides any guidance as to how a priority dispute between SPI and SPII is to be resolved. Sections 34(1) and 34(2) give priority to the holder of a purchase-money security interest under the prescribed circumstances over any other security interest in the same collateral given by D. This priority rule is of no help since in this context it provides a completely circular result. SPI has priority over SPII, who has priority over SPI.

The problem has not yet been addressed by Saskatchewan courts. However, when it is, the courts are likely to follow decisions of Ontario courts in which section 35 has been used to determine priority.[9] This approach may induce a change in the practices of persons who sell goods under instalment sales contracts. Under prior law, a seller who retained title in the goods until the full purchase price was paid never lost priority to someone who held a mortgage on the goods purchased, even though the mortgage may have been executed before the date of the sales contract. The reason for this was that the mortgage could only be an equitable mortgage on the interest of the buyer. That interest was only the interest of a buyer in possession under a conditional sales contract. The seller had priority because he held the legal title.

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[8] See *Terra Power and Tractor Co. Ltd.* v. *Touche Ross Ltd.* (1985), 42 Sask. R 102 (Q.B.).

[9] See *National Trailer Convoy of Canada Ltd.* v. *Bank of Montreal* (1980), 10 B.L.R. 196, 1 P.P.S.A.C. 87 (Ont. H.C.J.); *Re Polano and Bank of Nova Scotia* (1975), 95 D.L.R. (3d) 510 (Ont. Dist. Ct.).

Under the Act the same reasoning cannot be used. In the first place, the retention of title to the goods by the seller has no special significance under the Act; it amounts only to the creation of a security interest in favour of the seller. In the second place, even if title is viewed as remaining in the seller, this does not affect the situation since the priority scheme of the Act is not title based.

The practical result is that a seller who has a security interest in goods he sells can be subordinate to another secured party who has registered a financing statement claiming a security interest in the type or kind of goods sold by the seller to the buyer. In order to avoid this, sellers must conduct a search at the Registry before granting secured credit to buyers. The practice of selling vehicles or other high value goods to buyers on weekends or other times when a search of the registry is not possible carries with it greater risks since the Act came into force. The degree of risk is likely to be smaller when the goods being purchased are of a kind that must be described by serial number on a financing statement since a prior registered security interest in such goods cannot be perfected without the proper description of the collateral by serial number.

4. Security Interests in Accounts as Proceeds

The special priority given to purchase-money security interests extends to the proceeds of the original collateral in which the security interests were taken. As a general rule, sections 34(1) or 34(2) would give to a holder of a purchase-money security interest priority over any other security interest in the proceeds collateral, even though the other security interest was taken in the collateral as original collateral and not as proceeds collateral. However, this will not always be the case.

If the proceeds are in the form of chattel paper, the priority rules set out in section 31(5) must be applied to determine the relative priority of the purchase-money security interest in the chattel paper and a security interest (actual or deemed) in the chattel paper as original collateral.

If the proceeds are in the form of accounts, section 34(4) provides a special priority rule that overrides sections 34(1) and 34(2). Under this section, priority to the accounts is given to the holder of a security interest in the accounts as original collateral if he acquired his interest for "new value" and if a financing statement relating to his security interest was registered before the purchase-money security interest in the original collateral was perfected. In practical terms this means that the holder of a purchase-money security interest in original collateral cannot rely on having the purchase-money priority with respect to proceeds of that collateral in the form of accounts over a person with a security interest in the accounts perfected by registration of a financing statement before the purchase-money security interest is perfected. A financer planning to give secured purchase-money credit to a debtor should conduct a search of the registry to determine whether or not a financing statement indicating a claim to a security interest in accounts (including a claim to a security interest in all of the debtor's present and after-acquired property) has been registered against the name of the debtor. If it has, the financer must either get a subordination agreement from the person who registered the financing statement or proceed on the assumption that he has only a subordinate security interest in accounts resulting from any dealing with his original collateral. There is no equivalent to section 34(4) in the Ontario PPSA. However, the Manitoba PPSA is the same as the Saskatchewan Act in this respect.[10]

5. Priority of Non-proceeds Purchase-money Security Interests

Section 34(5) provides an additional exception to the operation of section 35 (first to register, take possession or perfect). The section was designed to deal with the following type of situation: SPI takes and perfects a purchase- money security interest in original collateral acquired by D. D thereafter purchases goods from SPII under a secured instalment sales contract that gives a security interest in the goods to SPII and that provides that SPII will take in trade as part of the purchase price the collateral in which SPI has a perfected security interest. When D goes into default on both security agreements, SPI claims the goods purchased from SPII as proceeds in which SPI has a purchase-money security interest. These goods came into D's possession as a result of a "dealing with" (section 2(ee)) the original collateral in which SPI had a perfected purchase-money security interest. SPII also has a purchase-money security interest in the goods he supplied to D; however, of necessity, this security interest will have been perfected by registration after SPI's security interest, and SPI would have priority under section 35. Section 34(5) was designed to reverse this commercially unreasonable result. If SPI did not give permission to D to sell the original collateral and if the sale by D was not in the ordinary course of D's business, SPI has his remedy against the original collateral or against SPII if the original collateral has been disposed of by him. If SPI has given permission to D to dispose of the original collateral, he will lose his security interest in the original collateral (section 28(1)(a)); but this is not a sufficient justification for allowing him to claim priority over SPII. SPII has supplied the credit to acquire the goods and as such should have first priority to them. Accordingly, section 34(5) gives priority to SPII's non-proceeds purchase-money security interest in the goods over SPI's proceeds purchase- money security interest in them.

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[10] See S.M. 1973, c.5-Cap.P35, s. 34(3). For an explanation of the policy underlying section 34(4), see R.C.C. Cuming, "Second Generation Personal Property Security Legislation" (1981-82), 46 *Sask. Law Rev.* 5, at 38-39.

6. Security Interests in Crops

Section 34(6) provides a special priority rule that is analogous to that applicable to purchase-money security interests. It gives priority with respect to a security interest in crops to a supplier or lender who provides credit for the acquisition of seed grain, fuel, fertilizer or other materials necessary for the planting of crops if the conditions of the section have been met. The security interest must have been given not more than three months before the crops become growing crops and the credit must have been given so as to enable the debtor to produce a crop in the next growing season.

The supplier or lender is not given priority over all other financers with security interests in the crops, but only over those who took their security interests to secure obligations contracted more than six months before the crops become growing crops. Accordingly, any other secured creditor who has given credit to the debtor during the six month period prior to planting the crops and has taken a security interest in those crops is not affected by the special priority rule of section 34(6). This is so even though the credit given to the debtor is not used by him in connection with his farming operations. The obvious purpose of the section is to assist persons in the business of farming to acquire immediately prior to planting a crop the necessary credit facilities to acquire what is necessary in order to plant the crop.

This section should be read along with section 13(2) which provides that a security interest in crops cannot attach unless the crops are grown within one year after the security agreement has been executed.

6. The Concept of Purchase-money Security Interest Used in Other Provincial Legislation

The concept of purchase-money security interest as it appears in The Personal Property Security Act has been employed in a number of other provincial statutes in order to regulate the relative priority claims of secured creditors and other claimants to the property in which security interests have been taken.[11] It is also used in connection with legislation dealing with *inter partes* rights of secured creditors and debtors.[12]

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[11] See The Labour Standards Act, R.S.S. 1978, c. L-1, s.56, as amended S.S. 1980-81, c.63, s.5; The Executions Act R.S.S. 1978 c. E-12, ss.2-2.2, as amended S.S. 1979-80 c.24, s.3; The Department of Revenue and Financial Services Act, 1983, c. D-15, as amended S.S. 1984-85-86, c.62, s.6; The Landlord and Tenant Act, R.S.S. 1978, c. L-6, s.25 as amended S.S.1979-80, s.28, ss.3 and 4.

[12] See The Exemptions Act, R.S.S. 1978, c. E-14, ss.1.1(b) and 5(2), as amended S.S. 1979-80, c.25, s.3; and The Limitation of Civil Rights Act, R.S.S. 1978, c. L-16, ss.18, as amended S.S. 1979-80, c.29, s.3.

PRIORITY BETWEEN CONFLICTING SECURITY INTERESTS

35.-(1) If no other provision of this Act is applicable, priority between conflicting, perfected security interests in the same collateral is determined by the order of:

(a) registration;

(b) possession of the collateral by the secured party pursuant to section 24;

(c) perfection;

whichever is earliest, and, as between unperfected security interests, by the order of attachment.

(2) Where there is a period, after the registration of a security interest, the taking of possession of the collateral by the secured party or the perfection of the security interest, during which there is no registration of the security interest, possession of the collateral by the secured party or perfection of the security interest, priority of the security interest dates from the time when it is reregistered, reperfected or from the time the secured party retakes possession.

(3) The time for determining priority of conflicting security interests in proceeds where no other provision of this Act is applicable is the same time as established under subsection (1) for determining priority between conflicting security interests in the collateral.

(4) If future advances are made while a security interest is perfected, the security interest has the same priority for the purposes of this section with respect to future advances as it has with respect to the first advance.

(5) Where the registration of a security interest lapses as a result of the secured party's failure to renew the registration or where the registration of a security interest has been discharged fraudulently, in error or without authorization, the secured party may reregister his security interest within 30 days after the lapse or discharge, and where he reregisters, the prior lapse or discharge does not affect the priority status of the security interest in relation to competing interests in the collateral which arose prior to the lapse or discharge, except insofar as subsequent advances are made or contracted for following the lapse or discharge and prior to the reregistration.

(6) Where a debtor transfers his interest in collateral which, at the time of the transfer is subject to a perfected security interest, that security interest has priority over any other security interest granted by the transferee before the transfer, except insofar as the security interest granted by the transferee secures advances made or contracted for after the transfer at a time when the security interest granted by the debtor is unperfected through the operation of section 49.

(7) Subsection (6) does not apply where the transferee acquires the debtor's interest free from the security interest granted by the debtor.

Definitional Cross-References:

"collateral" - s.2(f)
"debtor" - s.2(k)
"future advance" - s.2(r)
"proceeds" - s.2(ee)
"secured party" - s. 2(kk)
"security interest" - s.2(nn)

1. The Residual Priority Rule
2. Priority of Future Advances
3. Priorities after Re-registration
4. Exception to First in Time Rule

1. The Residual Priority Rule

The priority structure of the PPSA basically consists of a set of priority rules dealing with specific situations and a residual priority rule for all other situations in which priority conflicts arise. Section 35(1) is the residual priority rule of the Act. The section applies "if no other provision of this Act is applicable".

The system embodied in section 35(1) is simple in application. Priority between conflicting security interests in the same collateral is resolved on the basis of a first in time rule. Priority is not given to the first secured party to acquire a security agreement with the debtor and is not necessarily given to the first secured party with a perfected security interest. Priority is given to the secured party who is the first to take one of the three measures specified in the section: (1) effect a valid registration of a financing statement; (2) take possession of the collateral for the purpose of perfecting a security interest in it, or (3) acquire a temporarily perfected security interest in the collateral. There are several significant features of this system.

(a) In order to have priority under the section, it is necessary to have an attached and perfected security interest in the collateral (see sections 19 and 20(1)(a)), but priority is *not* based on the time of attachment or perfection unless all of the competing security interests are unperfected or perfected otherwise than through registration. The operation of the section in this respect is demonstrated in the following scenario: A secured party (SPI) registers a financing statement naming a debtor (D) as debtor and describing the collateral as automobiles. This he can do under section 44(2) even though D has not executed a security agreement. Another secured party (SPII) enters into a security agreement with D providing for a non-purchase money interest in automobiles owned by D. SPII registers a financing statement relating to the security agreement and advances the money to D. At this point SPII has a perfected security interest in D's automobile, while SPI does not since at this point SPI has no security agreement with D and therefore could not have an attached security interest in any of D's personal property. Later, SPI enters into a security agreement with D taking a security interest in D's automobiles and advances money to D. In the event of default by D under both security agreements, SPI has priority over SPII since SPI was the first to either register a financing statement, take possession of the collateral or obtain a temporarily perfected security interest.

(b) Notice of the existence of a prior, perfected security interest in the collateral does not affect priorities under the section.[1] Accordingly, even though SPI was aware of the existence of SPII's security interest when he took his security interest, his priority position is not affected. SPII must have acted in good faith (see section 64(1)), but proceeding with the knowledge of the existence of the prior interest does not amount to bad faith.[2] The situation may well be different if SPII has knowledge not only of the existence of SPI's prior security interest, but also has actual knowledge of the existence of a restrictive provision in the security agreement that prohibits the debtor from granting a security interest to SPII. This may attract tortious liability for interference with contractual relations, and may additionally amount to bad faith sufficient to preclude SPII from asserting priority over SPI.[3]

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[1] *Robert Simpson Co. Ltd.* v. *Shadlock* (1981), 31 O.R. (2d) 612 (Ont. S.C.); *Bank of Nova Scotia* v. *Gaudreau* (1984), 48 O.R. (2d) 478 (Ont. H.C.J.).

[2] G. Gilmore, *Security Interests in Personal Property* (1965), Vol. II, at 898-902. See also *In re Gunderson*, 4 U.C.C. Rep. 358 (S.D.Ill. (Bankr.) 1975); *Bloom* v *Hilty*, 234 A. 2d 860 (Pa. 1967); *Berga* v. *Amit International Trade, Inc.*, 511 F. Supp. 432 (E.D. Pa. 1981). And see C. Felsenfeld, "Knowledge as a Factor in Determining Priorities Under the Uniform Commercial Code" (1967), 42 *New York U. Law Rev.* 246. See also the commentary accompanying section 5.

(c) A security interest perfected in one way does not lose the priority status given to it by section 35 because there has been a change in the method of perfection. See section 23(1). However, if there is an interim period during which there is no registration, possession or temporary perfection, the priority of the security interest does not relate back to the date of the original registration, possession or perfection, but dates from the point when the period of non-perfection comes to an end. See section 35(2).

(d) Under section 28, a security interest in original collateral becomes a "continuous perfected security interest" in proceeds if the original collateral is perfected and the requisite steps are taken to continue its perfection in the proceeds. The Act treats the security interest in the proceeds as an extension of the original security interest and not as a new security interest that comes into existence when the proceeds come into existence. Accordingly, section 35(3) provides that the priority position of the interest in proceeds under section 35(1) is to be determined on the basis that the proceeds collateral is the original collateral. If the secured party fails to take the necessary steps prescribed by sections 28(2) and 28(3) to continue the perfection of the security interest in the proceeds, section 35(3) has no effect.

Notwithstanding the ambiguous wording of section 35, it is clear that the section applies to any situation in which there are conflicting claims to security interests in collateral which are proceeds under at least one of the security interests. It is not necessary that the collateral be proceeds under all of security interests involved. If, for example, SPI has a security interest in collateral as proceeds and SPII has a security interest in the same collateral as original collateral, under section 35(3) priority between them is determined under the first in time rule of section 35(1).

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[3] But note that in *Bank of Nova Scotia* v. *Gaudreau*, *supra*, footnote 1, at 513-19 the court held that the priority given to a perfected security interest over an unperfected security interest provided a sufficient justification so as to negate liability for inducing breach of contract. However, the case might be distinguished on the basis that the Ontario PPSA does not have a provision equivalent to section 64 which requires that the parties act in good faith.

2. Priority of Future Advances

The operation of the future advance provisions of the Act are discussed in detail in the commentary accompanying section 14.

There is an ambiguity in section 35(4) which requires clarification. The section provides that if future advances are made while a security interest "is perfected", the security interest has the same priority with respect to the future advances as it has with respect to the first advance. There is a suggestion in the section that in order for tacking to occur, the future advances must be made when the security interest is perfected. This interpretation of the section must be put into the context of the basic structure of section 35(1). Priority under section 35(1) is not dependent on the date of perfection in all cases. A security interest will have first priority under section 35(4) even though it is the last of the competing security interests to be perfected if the holder of the security interest was the first of the competing parties to register a financing statement or take possession of the collateral and if he did so before any other competing security interest was temporarily perfected. This priority status is not affected in any way by the amount of money loaned to the debtor (so long as value is given to him) nor the date or dates when the advances under the security agreements are made. Indeed, the security interest has priority under section 35(1) even though all of the money to be loaned to the debtor is advanced after all advances are made under the security agreements creating the competing security interests.

Accordingly, it would be inconsistent with section 35(1) to read section 35(4) as limiting the right to tack future advances to situations in which the advances are made when the security interest is registered. As a matter of statutory construction, it is proper to read sections 35(1) and (4) together to mean that all advances made under a security agreement whenever made may be tacked, and the priority status of the security interest securing those advances is to be determined in accordance with section 35(1). Section 35(1) applies to all advances made before perfection of the security interest, and section 35(4) applies with respect to advances made after its perfection.

3. Priorities after Re-registration

Section 48(1) sets out the basic rule that renewal of a registration must occur before the expiry of the registration. In other words, once a registration has expired it cannot be revived or continued. Any attempt thereafter to re-register a financing statement so as to continue the registration will fail. There must be an entirely new registration; and if there is no interim perfection by some other means, section 35(2) applies to render unperfected any security interest to which the expired registration related.

There are other reasons why a registration may prematurely cease to exist. It may be inadvertently discharged by the registering party or his employee, it may be discharged by someone who did not have authority or authorization but who acted honestly, and it may have been discharged by someone who acted fraudulently. When the Registry receives a financing change statement indicating the discharge of a security interest or receives a discharge verification statement that is properly completed, it processes the document without further inquiry. See section 48(3). Registry officials have no way to determine whether the person who tendered the document for registration was acting with authority or was acting with care or in good faith. The uselessness of affidavits of good faith as a method of guarding against bad faith or fraudulent conduct is well documented; consequently, they were not made a feature of the discharge procedures of the Act. A much more effective alternative is the discharge verification system used by the registry. For a description of this system, see the commentary accompanying section 48.

Section 35(5) is a central feature of a system designed to prevent injustice in cases where there has been a fraudulent or otherwise unauthorized discharge of a registration. These measures apply as well to situations in which a registration has lapsed through inadvertence. Under the section, if the secured party re-registers (i.e., tenders a properly completed financing change statement) within a period of thirty days from the date the registration lapsed or was discharged, he maintains his pre-lapse or discharge priority position vis-a-vis "competing interests in the collateral which arose prior to the lapse or discharge" other than any such interests that relate to "advances made or contracted for following the lapse or discharge and prior to the registration".

It is possible that a circular priority problem will result for the operation of section 35(5). The following scenario illustrates this problem: Prior to the discharge SPI had priority over SPII because of prior registration. After the lapse but before the re-registration, SPIII registers a financing statement. As a result of the operation of section 35(5), SPI has priority over SPII. However, as a result of section 35(1), SPII has priority over SPIII and SPIII has priority over SPI. The result: SPI over SPII over SPIII over SPI.

Section 35(5) is not the only provision in the Act that creates a potential for circular priorities. Legislation should generally avoid circular priority problems as far as possible because they usually require resolution by a court and, consequently rob the system of predictability. However, the cost of eliminating the potential for circular priorities in the context of fraudulent or unauthorized discharge of a registration was considered too high by the Legislature. The need to give some degree of security to registering parties was apparently thought to be a more important goal than eliminating of the potential for circular priority problems in this context.

4. Exceptions to First in Time Rule

Section 35(6) states an exception to the first in time rule provided in section 35(1). The operation of the section is displayed in the following scenario. A secured party (SPI) takes a security interest in all of a debtor's (D1) present and after-acquired property and properly registers a financing statement on May 1. Another secured party (SPII) takes a non-purchase-money security interest in D2's widget maker and perfects his security interest by registration on June 1. On July 1, D2 sells the widget maker to D1, and SPII complies with section 49 by registering a financing change statement disclosing the transfer. Both SPI and SPII claim priority to the widget maker. In the absence of section 35(6), SPII would be faced with the argument that SPI would have first priority under section 35(1) since he was the first to register a financing statement relating to the widget maker. Section 35(6) recognizes that to give priority to SPI in this situation would be commercially unreasonable.

Section 35(7) adds a further qualification. If the sale between D2 and D1 was such that D1 took free of SPII's security interest (i.e., the sale was in the ordinary course of business such that section 30(1) applies, or SPII authorized the sale such that section 28(1)(a) applies), then this has the effect of cutting off SPII's security interest so that any subsequent transferee of DI, whether or not a secured party, is equally sheltered from SPII's security interest.

There are other occasions in which the express priority rules in sections 35(6) and (7) do not apply. Here, a fundamental question arises: do sections 35(1) and the other priority sections (other than section 34 which is clear on the point) apply only when there are two or more competing security interests in the same collateral *given by the same debtor*, or do they apply as well when there are two or more competing interests in the same collateral given by two different persons?

For example, suppose that SPI takes a security interest in D's automobile (which is held by D as consumer goods), but fails to register its security interest. D then sells the automobile to B while SPI's security interest was unperfected. However, B is aware of SPI's security interest, and as a result does not take free of SPI's security interest in it under section 20(1)(e).[4] B then grants a security interest in the automobile to SPII who perfects the security interest after having obtained a search result from the registry using the serial number of the automobile and B's name as the search criteria. SPII's search will not disclose SPI's unregistered security interest. If the Act's priority rules apply to competing interests in the same collateral granted by different persons, then a priority competition between SPI and SPII is to be determined by applying section 20(1)(a), and SPII would be entitled to priority.[5] If, however, the Act's priority rules apply only where the competing interests are given by the same debtor, SPI's priority position vis- a-vis SPII would be determined by the application of the common law principle of *nemo dat quod non habet*. In other words, SPII's security interest in the automobile could only attach to B's interest (i.e., an interest subject to SPI's security interest). SPI would be entitled to priority, and this would be so even though SPI did not register his security interest, and SPII took all available steps to protect himself.

Of the two positions, the former should be preferred on policy grounds and as a matter of statutory construction. The *nemo dat* approach forces one to the conclusion that the registry system is only of limited use as a method through which third parties may protect themselves when dealing with persons in possession of collateral. If, however, it is accepted that section 20(1)(a) applies to any competing secured party whether he takes a security interest from the debtor or from a transferee of the debtor, the registry system will have fulfilled the expectations that most people in the position of SPII have of it.[6] Furthermore, as a matter of interpretation there is a sound basis for the concluding that the priority rules of section 20 apply to any transferee or subsequent secured party whether or not such transferee or subsequent secured party deals with the debtor who has given the competing unperfected security interest. The fact that the legislature thought it necessary to include section 35(6) is evidence that it intended the priority rules of the Act to displace the principle of *nemo dat quod non habet* in cases where a competing interest was not acquired directly from the debtor. Further the fact that sections 34(1) and 34(2) apply only to situations where two purchase- money security interests are "given by the same debtor" is further indication that in other priority provisions not containing this limitation, a broader application of the priority rules was intended by the Legislature.

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[4] If section 20(1)(e) were satisfied, or if the sale was in the ordinary course of the seller's business such that section 30(1) applied, or if SPI authorized the sale, here again the doctrine of sheltering would apply and B, as well as any subsequent transferee of B, including a secured party, would take free of SPI's security interest.

[5] If SPI subsequently registered or otherwise perfected his security interest, priority, on this theory, would then be resolved by applying the first to register or perfect rule of s.35(1).

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[6] A similar controversy arises where B, rather than granting a security interest in the collateral, transfers it to a buyer (B2). Here too it is argued that section 20(1)(e) should apply to subordinate an unperfected security interest to any subsequent transferee who satisfies section 20(1)(e). See the commentary accompanying section 20.

FIXTURES

36.-(1) Except as provided in subsections (2) and (3), a security interest that attaches to goods:

(a) before they become fixtures has priority as to the goods over the claim of any person who has an interest in the real property;

(b) after they become fixtures has priority over the claim of any person who subsequently acquires an interest in the real property, but not over any person who has a registered interest in the real property at the time the security interest attaches to the goods and who

has not consented in writing to the security interest or disclaimed an interest in the goods as fixtures.

(2) A security interest mentioned in subsection (1):

(a) is subordinate to the interest of:

(i) a subsequent purchaser for value of an interest in real property; and

(ii) a person with a prior registered encumbrance on the real property in respect of subsequent advances;

if the subsequent purchase or subsequent advance under a prior encumbrance is made or contracted for without fraud and before the security interest is filed in accordance with section 54; and

(b) is subordinate to the interest of:

(i) a creditor of the debtor; and

(ii) a sheriff;

who has acquired through legal process a lien or charge against the land to enforce a judgment if the lien or charge arises before the security interest is filed in accordance with section 54.

(3) No lien or charge mentioned in clause (2)(b) takes priority over a purchase-money security interest in the goods that is filed in accordance with section 54 before, on or within 15 days after the day the debtor obtains possession of the goods.

(4) A secured party who, under this Act, has the right to remove goods from real property shall exercise his right of removal in a manner that causes no greater damage or injury to the land or to the other property situated thereon, or that puts the owner, lessee or occupier of the land to any greater inconvenience than is necessarily incidental to the work of effecting the removal of the goods.

(5) Any person, other than the debtor, who has an interest in

real property at the time goods subject to a security interest are attached to the real property is entitled to reimbursement for any damage to his interests in the real property resulting from the removal of the goods, but is not entitled to reimbursement for diminution in the value of the real property caused by the absence of the goods removed or by the necessity for replacement.

(6) The persons entitled to reimbursement as provided in subsection (5) may refuse permission to remove the goods until the secured party has given adequate security for the reimbursement.

(7) The secured party may apply to a court for an order:

(a) determining the persons entitled to reimbursement under this section;

(b) determining the amount and kind of security to be provided by the secured party;

(c) prescribing the depository for the security;

(d) dispensing with the consent of any or all of the persons mentioned in clause (a).

(8) A person having an interest in real property that is subordinate to a security interest by virtue of subsection (1) may, before the goods have been removed from the real property by the secured party, retain the goods upon payment to the secured party of the amount secured by the security interest having priority over his interest.

(9) The secured party who has the right to remove goods from real property shall serve, on each person who appears by the records of the land titles office to have an interest in the land, a notice in writing of his intention to remove the goods which notice shall contain:

(a) the name and address of the secured party;

(b) a description of the goods to be removed sufficient to enable them to be identified;

(c) the amount required to satisfy the obligation secured by his security interest;

(d) a description of the land to which the goods are affixed; and

(e) a statement of intention to remove the goods unless the amount secured is paid on or before a specified day that is not less than 12 days after service of the notice in accordance with subsection (10).

(10)A notice mentioned in subsection (9) shall be served at least 15 days before removal of the goods and may be served in accordance with subsection 67(1) or by registered mail addressed to the post office address to the person to be served as it appears in the records of the land titles office.

(11)Any person entitled to receive a notice under subsection (9) may apply to a judge for an order postponing removal of the goods from the real property, and the judge may make any order that he considers just and reasonable.

Definitional Cross-References:

"collateral" - s.2(f)
"court" - s.2(i)
"creditor" - s.2(j)
"debtor" - s.2(k)
"fixtures" - s.2(p)
"goods" - s.2(s)
"judge" - s.2(x)
"obligation secured" - s.2(aa)
"person" - s.2(cc)
"purchaser" - s.2(ff)
"purchase-money security interest" - s.2(gg)
"secured party" - s.2(kk)
"security interest" - s.2(nn)
"value" - s.2(qq)

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1. Purpose of the Section
2. The Rights of the Holder of an Interest in the Realty
3. The Priority Regime of the Section
4. Enforcing of a Security Interest in a Fixture

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1. Purpose of the Section

Section 36 has two primary functions: (1) it reverses the common law principle that chattels affixed to realty lose their separate identity as personal property and become part of the realty to which they are affixed; and (2) it provides a system through which persons acquiring interests in realty can be forewarned of the existence of a chattel security interest in goods affixed to realty in which they are acquiring an interest.

Although the term "fixture" is included in the interpretation section of the Act, it is not defined except by reference to the common law and by an express exclusion of "building materials" as defined in section 2(d). See section 2(p). In other words, where building materials are involved a security interest in them cannot be maintained as a personal property interest under the system in section 36.

2. The Rights of the Holder of an Interest in the Realty

Section 36(1) draws a distinction between a situation in which a personal property security interest attaches to goods before they are affixed to the realty (section 36(1)(a)) and a situation in which the interest attaches after the goods become fixtures (section 36(1)(b)). In the former situation, the consent of the person with an interest in the realty to which the goods are to be or have been affixed is not a pre-requisite to the retention of the security interest in the goods after they become fixtures. In the latter situation consent is a prerequisite. Under section 36(1)(a) a person with a security interest that attaches to goods before they are affixed to the realty has priority over any person with an interest in the realty. This priority is not dependent upon registration of the security interest in the Personal Property Registry or upon filing in a land titles registry. Registration in the Personal Property Registry is relevant only when there are competing personal property security interests in the goods as goods and not as fixtures. Filing in a land titles registry is relevant when there is a priority dispute between the holder of the security interest in the fixture and a person who acquires an interest in the real property after the goods become fixtures. This includes a prior mortgagee who makes or contracts to make advances under his mortgage after the goods become fixtures.

3. The Priority Regime of the Section

Section 36(2) provides the priority regime applicable to a competition between a personal property security interest in the fixtures and a subsequently acquired interest in the realty. If the security interest is filed in the appropriate land titles registry in accordance with section 54, it has priority over any interest subsequently acquired in the realty and over any charge against the realty arising out of judgment enforcement proceedings. However, failure to register the personal property security interest results in its subordination to a specified range of subsequent interests.

Under section 36(2)(a)(i) the unfiled security interest is subordinate to a subsequent "purchaser" for value of an interest in the real property. A "purchaser" as defined in sections 2(hh) and 2(ff) is not restricted to buyers, but includes mortgagees as well. However, this definition is restricted to transactions "creating an interest in personal property", so, strictly speaking, it does not apply. The term "purchaser" has no uniform legal meaning. Although in some statutes it denotes a buyer for money, the traditional meaning of the term is a person who obtains title in any other mode other than descent or devolution of law[1] (i.e., a voluntary transfer of title). In light of the traditional meaning given to "purchase" in respect of personal property in section 2(ff), a similar meaning must be placed on "purchaser" in section 36. Accordingly, it should encompass a mortgagee of the real property. This conclusion is consistent with the policies of The Land Titles Act[2] and the PPSA which are designed to provide public disclosure of interests.

Under section 36(2)(a)(ii) an unfiled personal property security interest in fixtures is subordinate to the interest of a person with a prior registered encumbrance on the real property in respect of subsequent advances if such advances are made or contracted for without fraud and before the security interest is filed in accordance with section 54. The section is somewhat ambiguous in its reference to advances "contracted for...before the security interest is registered". This may suggest that if the advances are contracted for any time before filing of the security interest, even before the goods become fixtures, the encumbrancer has priority. Under this interpretation, a prior mortgagee would always have priority over the holder of the security interest in the fixture since the mortgage arrangement will always involve advances that are "contracted for" before the security interest is filed.

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[1] *Inland Revenue Commissioners* v. *Gribble*, [1913] 3 K.B. 212, at 218, per Buckley L.J.

[2] R.S.S. 1978, c. L-5.

An alternative interpretation of the section, and one that is more consistent with its policy, is to read it as subordinating an unfiled security interest in the fixtures to the interest of a person with a prior encumbrance on the real property in respect of subsequent advances made or contracted for *after the goods are affixed to the real property* and before the security interest is filed. There is no good reason why advances contracted for under a mortgage arrangement entered into before the goods are affixed to the realty should have priority over the unfiled security interest. The mortgagee committed himself to making the advances on the basis of the value of the realty at the date of execution of the mortgage. It would be a windfall if he were to be given priority with respect to the fixtures later added to the property unless the goods affixed to the realty were replacements for goods removed from the realty by the mortgagor. Even in this event, there is no commercially sound reason to give priority to the mortgagee over the holder of a security interest in the fixtures. Indeed, if the section were to be given this interpretation, one of the primary goals underlying it would be frustrated. Secured creditors would be reluctant to finance the acquisition of goods of a kind that normally become fixtures since they would have little assurance that they could protect their security interests in the goods.

The purchase or subsequent advances made under a prior encumbrance need not have been made without the knowledge of the unfiled security interest in the fixtures. All that is necessary is that the purchaser or encumbrancer act without fraud. In this respect, the section parallels section 137(2) of *The Land Titles Act*.

There is one feature of the priority system prescribed by sections 36(1) and 36(2) which may be a cause of concern for real property owners, which is displayed in the following scenario. The owner of the real property (O) enters into a contract with a contractor (D) to build improvements on the real property that include the acquisition and installation of fixtures to be acquired by D. D purchases the goods as required by the contract and affixes them to the realty. However, he gives a security interest in the goods to the seller (SP) who perfects his interest in the goods by registration in the Personal Property Registry. If O pays D the contract price without ensuring that D pays SP, SP can enforce his security interest in the goods and in so doing has priority over O. Since SP's security interest attached to the goods before they became fixtures, the priority structure of section 36(2) applies so as to require SP to file his security interest in the land titles registry if he is to protect his interest against the claims of subsequent purchasers, encumbrancers and execution creditors. But O is none of these. Accordingly, SP has priority over O even though SP has failed to file his security interest in the registry.

When this problem came before the Manitoba courts, some skillful fact-finding was used to avoid an undesirable outcome.[3] However, there is no assurance that Saskatchewan courts will do the same. A practical solution for someone in the position of O is to determine the identity of the suppliers of goods to be installed on the realty and ensure that they are paid before paying the contract amount to D. Another measure that will be effective if D is viewed as being in the business of selling goods of the kind called for in the contract is to include a clause in the contract between O and D providing that property in the goods to be affixed to the realty passes to O before they are affixed. This clause should bring O under the protection of section 30(1).[4]

Section 36(2)(b) specifies the relative priorities of a security interest in a fixture that has not been filed in accordance with section 54 and the interests of a creditor of the debtor or sheriff who has acquired through legal process a lien or charge against the land. The section does not give to the creditor or the sheriff a lien or charge; it simply recognizes that if such lien or charge arises before the security interest is filed under section 54, it has priority over the security interest. The source of a lien or charge to which the section refers will be The Executions Act,[5] and The Land Titles Act.[6] Under this legislation the registration of a writ of execution in the land titles registry office for the land registration district in which the real property to which the goods are affixed is situated binds and forms a charge on the land. Accordingly, the section states a simple first in time rule; as between the holder of a writ of execution and a secured creditor with a security interest in goods affixed to realty, priority goes to the one who first files the instrument establishing his claim under the land titles system.

Section 36(3) provides the standard fifteen day grace period for perfecting the security interest if it is a purchase-money security interest. This grace period applies only where the competing interest in the real property is a lien or charge to enforce a judgment; no grace period is provided where the competing security interest is that of a subsequent purchaser or other person mentioned in section 36(2)(a).

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[3] *Manning v. Furnasman Heating Ltd.*, [1985] 3 W.W.R. 266 (Man. Q.B.), aff'd [1985] 6 W.W.R. 1 (Man. C.A.).

[4] See *Camco Inc. v. Frances Olson Realty (1979) Ltd*, [1986] 6 W.W.R. 258, 50 Sask. R. 161 (Sask. C.A.).

[5] R.S.S. 1978, c. E-12, s.26.

[6] R.S.S. 1978, c. L-5, s.180.

4. Enforcing a Security Interest in a Fixture

Sections 36(4)-(11) are designed to balance the interests of persons who have enforceable security interests in goods that have become fixtures and persons who have interests in the realty to which those goods have been affixed. The following features of the sections are notable:

(a) Before removal of the fixture, the secured party serves a notice on each person who appears by the land titles records to have an interest in the realty indicating his intention to remove the fixture. This notice is designed to alert such persons so that they can exercise their rights under the section to be compensated for damage to the realty resulting from the removal, to demand security for such damages or to retain the goods upon discharge of the security interest in them and thereby prevent their removal.

(b) A person with an interest in the realty is entitled to be reimbursed for damage to the realty resulting from the removal of the fixtures. This, of course, does not include damage resulting from the diminution of the value of the property resulting from the fact that after removal the fixture is no longer part of the realty.

(c) A person with an interest in the realty is entitled to demand security for the damages to the realty, but cannot block removal by making unreasonable demands of the secured party.

(d) Any person with an interest in the realty is entitled to prevent the removal of the goods by paying to the secured party the amount secured by the security interest.

ACCESSIONS

37.-(1) Except as provided in subsections (2) and (3) of this section and in section 38, a security interest in goods that attaches:

(a) before they become an accession has priority as to the accession goods over the claim of any person in respect of the whole;

(b) after they become an accession has priority over the claim of any person who subsequently acquires an interest in the whole, but not over any person who has an interest in the whole at the time the security interest attaches to the accessions and who has not consented in writing to the security interest in the accession or disclaimed an interest in the accession as part of the whole.

(2) A security interest mentioned in subsection (1):

(a) is subordinate to the interest of:

(i) a subsequent purchaser for value of an interest in the whole; and

(ii) a creditor with a prior perfected interest in the whole to the extent that he makes subsequent advances;

if the subsequent purchaser or subsequent advance under the prior perfected security interest is made or contracted for before the security interest is perfected; and

(b) is subordinate to the interest of:

(i) a creditor of the debtor; and

(ii) a sheriff;

who has caused the whole to be seized under judicial process to enforce a judgment, if the seizure occurs before the security interest is perfected.

(3) No interest of a creditor or the sheriff mentioned in

clause (2)(b) takes priority over a purchase-money security interest in the accession goods that is perfected before or within 15 days after the day the debtor obtains possession of the collateral.

(4) A secured party who has the right to remove accession goods from the whole shall exercise his right of removal in a manner that causes no greater damage or injury to the other goods or that puts the person who is in possession of the whole to any greater inconvenience than is necessarily incidental to the work of effecting removal of the accession goods from the other goods.

(5) Any person, other than the debtor, who has an interest in the other goods at the time the goods subject to a security interest become an accession to the other goods is entitled to reimbursement for any damage to his interest in the other goods resulting from the removal of the accession goods, but is not entitled to reimbursement for diminution in the value of the other goods resulting from the removal of the accession goods caused by the absence of the accession goods removed or by the necessity for replacement.

(6) The persons entitled to reimbursement as provided in subsection (5) may refuse permission to remove the accession goods until the secured party has given adequate security for the reimbursement.

(7) The secured party may apply to a court for an order:

(a) determining the persons entitled to reimbursement under this section;

(b) determining the amount and kind of security to be provided by the secured party;

(c) prescribing the depository for the security;

(d) dispensing with the consent of any or all of the persons mentioned in clause (a).

(8) A person having an interest in the other goods that is subordinate to a security interest by virtue of subsection (1) may, before the accession goods have been removed from the other goods, retain the whole upon payment to

the secured party of the amount secured by the security interest having priority over his interest.

(9) The secured party who has the right to remove accession goods from the whole shall serve, on each person known to him as having an interest in the other goods and on any person who has registered a financing statement indexed in the name of the debtor and referring to the other goods or according to the serial number where such is required, a notice in writing of his intention to remove the accession goods which notice shall contain:

(a) the name and address of the secured party;

(b) a description of the accession goods to be removed sufficient to enable them to be identified;

(c) the amount required to satisfy the obligations secured by his security interest;

(d) a description of the other goods sufficient to enable them to be identified; and

(e) a statement of intention to remove the accession goods from the whole unless the amount secured is paid on or before a specified day that is not less than 12 days after service of the notice in accordance with subsection (10).

(10) A notice mentioned in subsection (g) shall be served at least 15 days before removal of the accession goods and may be served in accordance with subsection 67(1) or, in the case of a person who has registered a financing statement, by registered mail addressed to the post office address of the person to be served as it appears on the security agreement or financing statement.

(11) Any person entitled to receive a notice under subsection (9) may apply to a judge for an order postponing removal of the accession goods from the whole, and the judge may make any order that he considers just and reasonable.

Definitional Cross-References:

"accession" - s.2(a)
"collateral" - s.2(f)
"court" - s.2(i)
"creditor" - s.2(j)
"debtor" - s.2(k)
"financing statement" - s.2(o)
"goods" - s.2(s)
"judge" - s.2(x)
"obligation secured" - s.2(aa)
"person" - s.2(cc)
"purchase-money security interest" - s.2(gg)
"purchaser" - s. 2(hh)
"secured party" - s.2(kk)
"security interest" - s.2(nn)
"value" - s.2(qq)

1. Purpose of the Section
2. Protection of Interests in the Whole
3. Enforcing a Security Interest in Accession Goods

1. Purpose of the Section

Section 37 has two primary functions: (1) it reverses the common law principle that under certain circumstances when chattels are attached to other chattels they lose their separate identity and become part of the chattels to which they are attached, and (2) it provides a system through which persons acquiring interests in goods can be forewarned of the existence of a security interest in goods that have become accessions to goods in which they are acquiring an interest.

The term "accession" is defined in the Act only by reference to the common law. Goods that are attached to other goods do not automatically become accessions to the other goods. Indeed, there may well be very few situations of commercial significance in which goods will be found at common law to have become accessions to other goods.[1] If this is the case, section 37 is of peripheral significance, but will provide protection in a small number of situations to persons who acquire goods to which have been attached other goods that are subject to security interests.

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[1] *Firestone Tire & Rubber Company of Canada Limited* v. *Industrial Acceptance Corporation Limited*, [1971] S.C.R. 357; *Ilford-Riverton Airways Ltd.* v. *Aero Trades (Western) Ltd.* (1977), 76 D.L.R. (3d) 742 (Man C.A.).

2. Protection of Interests in the Whole

Section 37(1) draws a distinction between a situation in which an interest attaches to goods before they become accessions (section 37(1)(a)) and a situation in which the interest attaches after the goods become accessions (section 37(1)(b)). In the former situation, the consent of the person with an interest in the goods to which the accession goods have been attached is not a pre-requisite to the retention of the security interest in the accession goods after they become accessions. This priority is not dependent upon registration of the security interest in the Personal Property Registry. Registration is, however, important when the security interest in the accession goods is in competition with another security interest in the accession goods themselves or with an interest in the whole acquired after the accession goods become part of the whole.

Section 37(2) provides the priority regime applicable to competition between a security interest in accession goods and a subsequently acquired interest in the whole. If the security interest is perfected, it has priority over any interest subsequently acquired in the whole and over any judgment enforcement measures taken against the whole. Failure to register the security interest results in its subordination to a specified range of subsequent interests. Priority is given to the holder of a security interest in the accession goods only when the security interest is perfected before the subsequent interest in the whole arises. It is not enough that the holder of the security interest registered a financing statement claiming the accession goods as collateral before the subsequent interest arises. Accordingly, if goods are joined to other goods and an interest is acquired in the whole by a third party before an enforceable security agreement between the secured party and the debtor exists, the fact that the secured party registered a financing statement before the subsequent interest was acquired does not give him priority as it would if the priority were regulated by section 35(1).

Under section 37(2)(a)(i) the unperfected security interest in the accession goods is subordinate to a subsequent "purchaser" for value of an interest in the whole. The term "purchaser" as defined in sections 2(hh) and 2(ff) includes, *inter alia*, both buyers and other secured parties.

Under section 37(2)(a)(ii) an unperfected security interest in accession goods is subordinate to the interest of a person with a prior perfected security interest in the whole to the extent of any subsequent advances if such advances are made or contracted for before the security interest is perfected. The section is somewhat ambiguous in its reference to advances "contracted for before the security interest is perfected". This may suggest that if the advances are contracted for any time before perfection of the security interest, even before the goods become accessions, the prior security interest has priority. Under this interpretation, the holder of a prior security interest would always have priority over the holder of the security interest in the accession goods since the security agreement providing for the prior security interest will always involve advances that are "contracted for" before the security interest in the accession goods is perfected.

An alternative interpretation of the section, and one that is more consistent with its policy, is to read it as subordinating an unperfected security interest in the accession goods to the interest of a person with a prior security interest in the goods to which the accession goods are joined in respect of subsequent advances made or contracted for *after the accession goods are joined to the other goods* and before the security interest in the accession goods is perfected. There is no good reason why advances contracted for under a security agreement entered into before the accession goods are joined to the other goods should have priority over the security interest in the accession goods. The holder of the security interest in the other goods committed himself to making the advances on the basis of the value of the other goods at the date of execution of his security agreement. It would be a windfall if he were to be given priority with respect to the accession goods later added to the other goods unless the accession goods were replacements for parts of the other goods removed by the debtor. Even if they are, there is no commercially sound reason for giving priority to the holder of the security interest in the other goods over the holder of the security interest in the accession goods. Indeed, if the section were to be given this interpretation, one of the primary goals underlying it would be frustrated. Secured creditors would be very reluctant to finance the acquisition of goods of a kind that normally become accessions since they would have little assurance that they could protect their security interests in the goods.

While the basic structure of section 37 closely parallels section 36, there is an important difference between them with respect to the degree of protection they provide to persons who acquire interests in property to which other goods subject to perfected security interests have been joined or affixed. The reason for this is that there is no direct counterpart in section 37 to registration of the security interest in the accession goods in a title based registry like that of the land titles system. This difference is demonstrated in the following scenario. SP sells item X to A under a security agreement providing for a security interest in item X taken to secure its purchase price. SP registers his security interest in item X using (as he must) A's name as the registration criterion. A joins item X to item Y, which is owned by B, in such a manner that item X becomes an accession to item Y. B then sells item Y + X to C who, before paying to B the purchase price of the item, obtains a search result from the registry using B's name as the search criterion. Being unaware of A or the fact A once was the owner of item X, C would not know that he should obtain a search result using A's name as the search criterion. SP's security interest in item X would not be disclosed on the search result obtained by C, yet C would take subject to it.

In order to give section 37 the same efficacy as section 36, it would have been necessary to include in section 37 a requirement that SP keep a close watch on his collateral so as to be able to identify the goods to which his collateral becomes an accession and then to register a financing statement using the name of the owner of the whole or the serial number of the whole (if it is the type of property which can be described by serial number under the Personal Property Regulations) as his registration criterion. Since it would be commercially unreasonable to require SP to do this, such a requirement was not included in section 37.

Section 37(2)(b) specifies the relative priorities of a security interest in accession goods and the interests of a creditor of the debtor or sheriff who has caused the whole to be seized under judicial process to enforce a judgment before the security interest in the accession was perfected. There is some ambiguity as to the meaning of "caused the whole to be seized under judicial process". The interpretation most consistent with the overall structure of the Act is to construe these words as a reference to the type of judgment enforcement measures set out in section 20(1)(b)-(c). It appears that an unperfected security interest in the accession goods is not subordinate to the trustee in bankruptcy of the owner of the whole if he is other than the debtor under the security agreement.

Section 37(3) provides the standard fifteen day grace period for perfecting the security interest if it is a purchase-money security interest. This grace period applies only where the competing interest in the whole is that of an unsecured creditor or a sheriff; no grace period is provided where the competing interest is that of a subsequent purchaser or other person mentioned in section 37(2)(a).

3. Enforcing a Security Interest in Accession Goods.

Sections 37(4)-(11) are designed to balance ther interests of persons who have enforceable security interests in goods that have become accessions and persons who have interests in the goods to which the accession goods have been joined. The following features of the sections are notable:

(1) Before removal of the accession goods, the secured party must serve a notice on each person known to him as having an interest in the goods to which the accession goods have been joined and on each person who has a registered security in such goods indicating his intention to remove the accession goods. This notice is designed to alert such presons so that they can exercise their rights under the section to be compensated for damage to the goods resulting from the removal, to demand security for such damages or to retain the goods upon discharge of the security interest in them and thereby prevent their removal.

(2) A person with an interest in the goods to which the accession goods have been joined is entitled to be reimbursed for damage to the goods resulting from the removal of the accession goods. This, of course, does not include damage resulting from the diminution of the value of the goods are no longer part of the whole.

(3) A person with an interest in the goods to which the accession goods have been joined is entitled to demand security for the damages to such goods, but cannot block removal by making unreasonable demands of the secured party.

(4) Any person with an interest in the goods is entitled to prevent the removal of the accession goods by paying to the secured party the amount secured by the security interest in the accession goods.

SECURITY INTERESTS IN COMMINGLED GOODS

38.-(1) A perfected security interest in goods that subsequently become part of a product or mass continues in the product or mass if the goods are so manufactured, processed, assembled or commingled that their identity is lost in the product or mass.

(2) Where more than one perfected security interest attaches to the product or mass, the security interests are entitled to share in the product or mass according to the ratio that the obligation secured by each security interest entitled to share bears to the sum of the obligations secured by all security interests.

(3) This section does not apply to a security interest in accession goods to which section 37 applies.

Definitional Cross-References:

"accessions" - s.2(a)
"goods" - s.2(s)
"obligation secured" - s.2(aa)
"security interest" - s.2(nn)

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1. The Purpose of the Section
2. Perfection of the "Continued" Security Interest
3. An Example of the Operation of the Section
4. Ambiguities in the Section

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1. The Purpose of the Section

Section 38 deals with a somewhat different situation than does section 37. It is assumed in the context of section 37 that there is a dominant chattel to which the accession goods are joined. The dominant chattel does not lose its separate identity; it simply takes on an added feature. Accession goods are such that they can be removed from the dominant chattel. Section 38 deals with a situation in which quantities of two or more separate items of goods are combined to make a mass or product under circumstances in which the separate identity of each is lost. Section 38(3) provides that section 38 will not apply if the accession provisions of section 37 apply. However, if the goods in which a security interest is taken are joined with other goods in such a way that both lose their separate identity, section 37 will not apply since the section contemplates removal of the goods. In such a situation section 38 applies if no other priority rule is applicable.

It is necessary to distinguish four different situations:

(1) Goods are joined to other goods but have not become accessions to the other goods. Here the ordinary priority rules of the Act apply without regard to the fact that the goods have been joined together.

(2) Goods are joined to other goods in such a way as to become accessions but not in such a way as to lose their separate identity. Section 37 governs a priority conflict between a security interest in the accession goods and a security interest in the whole (i.e., the accession goods and the goods to which they are joined). The ordinary priority rules apply to a priority conflict between two security interests in the accession goods themselves.

(3) Goods are joined to other goods in such a way as to lose their separate identity and become part of a product or mass. What distinguishes this category from the other two is that here the security interest in the separate goods is lost because the goods have ceased to exist and cannot even be identified in the product or mass. At common law "confusion" resulted. Section 38 was designed to deal with some of the priority disputes that arise in this context.

(4) Goods that are collateral under a security agreement are consumed and which, only in a very general sense, become part of a product or a mass. Drugs, antibiotics and food given to cattle and poultry or fertilizers or herbicides used in crop production and absorbed by crops fall within this category. It is most unlikely that the architects of the legislation ever intended that security interests in these types of goods would survive use or would carry over into the animals that consume them or crops that absorb them.

2. Perfection of the "Continued" Security Interest

Section 38(1) implies that a security interest in goods that form part of the product or mass is lost because the goods have lost their separate identity. However, by virtue of the section, the security interest "continues in the product or mass". Accordingly, a financer of raw materials has a security interest in any final product made up in whole or in part of the raw materials in which he had a security interest.

It is not clear from the section what measures must be taken by the holder of the "continued" security interest in the product to maintain the perfection of his security interest. When in other contexts the collateral under a security agreement changes, the Act requires that some re-perfection step be taken. Under section 28, the "continued" security interest in proceeds collateral is given only temporary perfection unless the proceeds collateral is cash proceeds or is the same type or kind as the original collateral. Under section 29(3) the statutory security interest in returned or repossessed goods given to the holder of chattel paper involving a security interest in those goods is given only temporary perfection after which it becomes unperfected unless perfection measures relating to the goods are taken. In the absence of any equivalent requirement, it appears that the "continued" security interest given by section 38(1) retains the perfected status of the security interest in the raw materials without any additional perfection step having to be taken. The justification for this may lie in the fact that the security interest in the raw material will most often be perfected by registration of a financing statement based on the debtor name as the registration criterion. Any third party obtaining a search result using this criterion will discover that a security interest has been taken in raw material used by the debtor. This should be adequate warning that this security interest is likely to be claimed in the finished product. The wording of section 38(1) indicates that failure to perfect or to maintain the perfected status of the security interest in the raw material will not merely result in the "continued" security interest in the final product being unperfected, but will prevent the security interest in the raw material from continuing in the product or mass.

It might be argued that section 38(1) gives to the secured party a security interest in proceeds, and that the secured party must therefore take the steps required by section 28 to perfect his security interest in the proceeds. This approach is based on the questionable assumption that the manufacturing, assembling or commingling referred to in section 38(1) constitutes a "dealing" with the raw material collateral within the meaning of section 2(ee).

3. An Example of the Operation of the Section

The operation of the section is illustrated in the following scenario. D is a chocolate manufacturer. He obtains sugar from SP1 under a secured credit arrangement that gives SPI a security interest in the sugar supplied by SPI. D's indebtedness to SPI is $10,000. He obtains cacao from SPII under a secured credit arrangement that gives SPII a security interest in the cacao supplied by SPII. D's indebtedness to SPII is $15,000. D manufactures chocolates using the sugar and cacao supplied by SPI and SPII respectively, but before they are sold they are seized by SPII because of D's default in performance of his obligations under the security agreement with SPII. D is also in default under his security agreement with SPI. Since SPI and SPII rank "equally", the proceeds of the sale of the chocolates cannot be allocated exclusively to the debt owing to SPII. If the chocolates are sold for $20,000, section 38(2) prescribes that this amount is to be distributed as follows:

$$\text{SPI: } \frac{\$10{,}000}{\$25{,}000} \text{ x } \$20{,}000 = \$8{,}000$$

$$\text{SPII: } \frac{\$15{,}000}{\$25{,}000} \text{ x } \$20{,}000 = \$12{,}000$$

4. Ambiguities in the Section

Section 38(2) prescribes a priority rule applicable in cases where more than one security interest continues in the product or mass, but there is an ambiguity in the section. It is not clear whether the section applies only where there are two or more security interests of the kind referred to in section 38(1) in the product or mass, or whether it applies as well to any situation in which there are two or more security interests in the product or mass, including a situation in which all competing security interests in the product or mass were created by agreement and not by operation of section 38(1). While the bare wording of section 38(2) seems to permit the broader interpretation, the scheme of the section and the concept of commercial reasonableness that permeates the Act militate against this conclusion. It would be impractical to adopt the broader interpretation of section 38(2), since to do so would introduce a priority rule that applies to the same types of situations to which sections 34 and 35 apply. This would produce confusion and would destroy the symmetry of the Act's priority structure.

A more difficult question is whether or not section 38(2) applies to a priority competition where one of the secured parties has a security interest in the product or mass as original collateral and the other secured party has a security interest in the product or mass under section 38(1). For example, D gives SPIII a security interest in chocolates or in all of D's present and after-acquired property, and this security interest comes into competition with a security interest arising under section 38(1) (e.g., SPI's security interest in the sugar). A major policy difficulty associated with application of the section 38(2) priority rule in this situation is that SPIII could rely on section 38(2) to circumvent a purchase-money security interest priority that SPI would otherwise have if section 34 were applied. In order to avoid this result, it is necessary to accept that section 38(1) gives SPI a security interest in the product or mass, but that section 38(2) does not apply to a priority competition between SPI and SPIII where they are both claiming priority to the product or mass. The priority competition is resolved by applying section 34(2) since SPI has a purchase-money security interest in the raw materials which he financed. If so (and assuming that SPI gave the requisite notice to SPIII as prescribed by section 34(2)-(3)), he would have priority over SPIII. This argument proceeds on the assumption that the security interest recognized in section 38(1) is not a new security interest but is an extension or alter ego of the purchase-money security interest held by SPI in the raw material.

There is another situation in which the operation of section 38(2) may be called into question. Assume that, as in the immediately preceding scenario, SPIII has a security interest in all of D's present and after-acquired property. Assume also that SPI takes and perfects a security interest in the sugar. The chocolates are made and shortly thereafter D defaults. SPIII claims a security interest in the chocolates, not by virtue of his after-acquired property clause which resulted in his security interest attaching to the chocolates, but by virtue of his after-acquired property clause attaching to the sugar as soon as D obtains rights in it. SPIII would argue that he has a "perfected security interest in goods that subsequently become part of a product or mass" within the meaning of section 38(1) and, therefore, section 38(2) allows him to share with SPI according to the formula of section 38(2) even though SPI has a purchase-money security interest in the sugar.

If priority is to go to SPI, as the general policy of the legislation would otherwise seem to dictate, it would be necessary to restrict the application of section 38(2) to situations where two or more competing security interests have been taken in separate components that go into a product or mass. In other words, section 38(2) should not apply to the following situations:

(a) competitions between two security interests taken in the product or mass;

(b) competitions between a security interest in a component that goes into the product or mass, and a security interest in the product or mass;

(c) competitions between two security interests in the same component that goes into the product or mass.

In such situations section 38(1) extends a security interest taken in the component to the product or mass (including its status as a purchase-money security interest), but the priority of the security interest is governed by the ordinary priority rules of the Act and not by section 38(2).

Section 38(2) should apply only where there is a competition between security interests in *separate* components that are combined into the same product or mass. If this condition is met, section 38(2) will govern and priority will not be determined under section 35 or section 34. Thus, the formula contained in section 38(2) should be applied even though SPI's security interest in the sugar was a purchase-money security interest and SPII's security interest in the cacao was a non-purchase-money security interest.

VOLUNTARY SUBORDINATION

39. A secured party may, in the security agreement or otherwise, subordinate his security interest to any other security interest.

Definitional Cross-References:

"secured party" - s.2(kk)
"security agreement" - s.2(mm)
"security interest" - s.2(nn)

While subordination agreements were a common feature of secured lending arrangements under pre-PPSA law, they have taken on a new significance since the Act was passed. One reason for this is the facility with which it is possible under the Act to take and perfect very broadly-based, fixed security interests in a debtor's property including a security interest in all of a debtor's present and after-acquired property. Other features of the priority system that have given new importance to subordination agreements are the first in time priority rule of section 35, the ability as provided in section 44(2) to register a financing statement before a security agreement has been executed and the power to tack future advances as provided in section 35(4).

Subordination agreements are now frequently used to reverse the priority rules that would otherwise prevail under the Act in cases where a debtor is seeking non-purchase money credit from a credit grantor who is not the first to register a financing statement. Section 39 recognizes this practice.

The section is more than just a declaration of the common law; it recognizes the efficacy of an undertaking to subordinate a security interest to another security interest even though the beneficiary of the subordination (the senior creditor) is not in a contractual relationship with the subordinating party. At common law a person who was not party to a subordination agreement could not take the benefit of it. The reference in section 39 to subordination by agreement "or otherwise" makes it clear that an undertaking to subordinate a security interest can be enforced by an intended beneficiary of the undertaking even though such beneficiary is not party to a subordination agreement.[1]

In some situations a subordination agreement may itself amount to a security agreement between the subordinator and the senior creditor under which the subordinator, in effect, "assigns" his security interest to the senior creditor. The security interest is taken in the subordinator's security interest and is given to secure the common debtor's obligation to the senior creditor. If this is the case, the senior creditor will be required to perfect his security interest by registering a financing statement in which the subordinator is named as debtor. Failure to do so would result in the senior creditor being subordinated to the interests of the subordinator's unsecured creditors, his trustee in bankruptcy or to any other "assignee" of the subordinator's security interest.[2] Registration of the subordination agreement under section 47 would not amount to registration of the senior creditor's security interest.

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[1] *Euroclean Canada Inc.* v. *Forest Glade Investments Ltd.* (1985), 16 D.L.R. (4th) 289, at 300-302 (Ont. C.A.).

[2] See also the commentary accompanying section 3 under the heading: 3. Unconventional Security Devices.

RIGHTS ARISING ON ASSIGNMENT

40.-(1) **Unless a debtor on an intangible or chattel paper has made an enforceable agreement not to assert defences or claims arising out of a contract, the rights of an assignee are subject to:**

(a) all of the terms of the contract between the debtor on an intangible or chattel paper and the assignor and any defence or claim arising therefrom; and

(b) any other defence or claim of the debtor on an intangible or chattel paper against the assignor that accrued before the debtor on an intangible or chattel paper received notice of the assignment.

(2) So far as the right to payment under an assigned contract right has not been earned by performance and notwithstanding notification of the assignment, any modification of or a substitution for the contract, made in good faith and in accordance with reasonable commercial standards and without material adverse effect upon the assignee's right under or the assignor's ability to perform the contract, is effective against an assignee unless the debtor on an intangible or chattel paper has otherwise agreed, but the assignee acquires corresponding rights under the modified or substituted contract.

(3) Nothing in subsection (2) affects the validity of a term in an assignment agreement which provides that a modification or substitution mentioned in that subsection is a breach of the agreement by the assignor.

(4) The debtor on an intangible or chattel paper may pay the assignor until he receives notice that the amount due or to become due under an identified transaction has been assigned and that payment is to be made to the assignee.

(5) A debtor on an intangible or chattel paper may pay the assignor if the assignee, when requested to do so by the debtor, fails to furnish to the debtor proof within a reasonable time that the assignment has been made.

(6) A term in any contract between a debtor on an intangible and an assignor which prohibits assignment of the whole of an account or intangible for money due or to become due is void.

Definitional Cross-References:

"account" - s.2(a)
"chattel paper" - s.2(e)
"debtor" - s.2(k)
"intangible" - s.2(v)
"money" - s.2(z)

1. The Purpose of the Section
2. Waiver of Defence Agreements
3. Modification or Substitution of the Assigned Contract
4. Debtor Protection
5. Anti-assignment Clauses

1. The Purpose of the Section

Section 40 is designed to amplify and in some respects modify the basic law of assignment of choses in action (i.e., the rules of equity and The Choses in Actions Act[1]) as it relates to the types of transactions to which the Act applies. While not all-inclusive, the Act applies to a wide range of transactions involving the assignment of intangibles and chattel paper. See section 3. In practice, section 40 has its most important influence in the context of assignments of intangibles in the form of accounts and assignments of chattel paper. Section 40(1) parallels the rules of equity applicable to equitable assignments and sections 5 and 6 of The Choses in Actions Act.

A superficial reading of section 40(1)(a) might lead to the conclusion that the assignee is subject to the "terms of the contract between the debtor...and the assignor" thereby placing on the assignee the performance obligations of the contract. However, this was clearly not the object of the legislation. It is the "rights of the assignee" that are subject to the terms of the contract. In other words, the assignee's right to collect from the debtor is conditioned by the extent to which the assignor has met his performance obligations under the contract.

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[1] R.S.S. 1978, c. C-41.

2. Waiver of Defence Agreements

Section 40(1) makes reference to an agreement in which a debtor on an intangible or chattel paper "has made an enforceable agreement not to assert defences or claims arising out of a contract". This is a reference to the ubiquitous cut-off or waiver of defence clauses found in secured instalment sales contracts (chattel paper). The section does not give legal enforceability to such agreements. It simply provides that if such an agreement is entered into and if the agreement is enforceable, the terms of the agreement and not section 40(1)(a) and (b) apply to the relationship between the debtor and the assignee. Such agreements are likely enforceable at common law.[2] However, they have very limited efficacy in the context of consumer credit contracts.[3]

3. Modification or Substitution of the Assigned Contract

Section 40(2) modifies the law otherwise applicable to assignments. It is designed to provide some flexibility to parties to a contract in cases where the right to payment under the contract has been assigned to a third party. Apart from this provision, the assignee of the payment rights must consent to any modification or substitution of the contract if the modification affects his rights in any way. This is commercially unrealistic. The section gives the needed flexibility to the parties to the contract without substantially prejudicing the position of the assignee. If the modification or substitution amounts to a breach of the assignment, the assignee has his ordinary contract rights against the assignor. See section 40(3). However, the modification or substitution continues to be legally effective so long as it does not go beyond what is allowed by section 40(2).

4. Debtor Protection

Sections 40(4) and (5) state in express terms what is implied in sections 4 and 5 of The Choses in Actions Act. In addition, they provide procedural safeguards to debtors who are otherwise placed in the difficult position of having to run the risk that a notice of an assignment given by someone other than the assignor is not supported by a valid assignment. These provisions must be read subject to section 43.1 of The Agricultural Implements Act.[4]

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[2] *Killoran* v. *Monticello State Bank*, [1921] 1 W.W.R. 988 (S.C.C.).

[3] The Cost of Credit Disclosure Act, R.S.S. 1978, c. C-41, s.17.

[4] R.S.S. 1978, c. A-10, as amended S.S. 1980-81, c.44, s.5.

5. Anti-assignment Clauses

Section 40(6) reverses what appears to the rule otherwise applicable to assignments. While the issue remains in doubt, it has been held in one English decision[5] that a clause in a contract between A and B under which B agrees not to assign his right to payment arising under the contract is effective to deprive C, the assignee of B's rights under the contract, from enforcing the rights against A.

As a matter of policy, the choice between enforceability and unenforceability of such clauses is not easily made. In favour of enforceability is the proposition that A and B should be free to make any contract they wish and their wishes should be respected so long as illegality is not involved. A, the debtor, has a legitimate interest in preventing the assignment of the contract by B to C, because under the law of assignments after A has been notified of the assignment he cannot set-off against his obligations arising under the contract an obligation owing to him by B and arising under a separate contract between them. On the other side is the long-standing hostility at common law toward inalienability of personal property rights. If A sells a car to B under a contract providing that B will not sell the car to C, any such sale by B is effective to pass property in the car to C. A right to payment is property and its alienability should not be prevented by contract any more than the sale of B's interest in the car can be prevented.

Section 40(6) opts in favour of free alienation of rights and against freedom of contract.[6] However, this policy choice was likely based more on practical considerations than on theoretical ones. Clauses prohibiting assignment of payment rights are found most often in contracts between small suppliers and large buyers. This type of clause is inserted at the insistence of the buyer who does not want to be bothered with having to deal with an assignee or who wants to retain his right of set-off. If the clause were to be given legal effect, crucial sources of financing otherwise available to small suppliers would be denied to them. Frequently the suppliers' accounts are the most valuable assets they have available. If they cannot assign those accounts either as collateral to a lender or sell them outright to a factor, their ability to remain in business may be jeopardized.

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[5] *Helstan Securities Ltd.* v. *Hertfordshire County Council*, [1978] 3 All E.R. 262 (Q.B.D.).

[6] The policy underlying section 40(6) has also been adopted in section 4.11(3) and (4) of the Uniform Sale of Goods Act. See Uniform Law Conference of Canada, *Proceedings of the Sixty-Third Annual Meeting* (1981), at 185.

Section 40(6) does not make void a clause in an agreement that prohibits fractional assignments of payments earned under the contract. A buyer should not be required to deal with two or more assignees of portions of the same debt. Further, since there is no mention in the section of contracts that are the substance of chattel paper one must conclude that the common law rule applies to anti-assignment clauses in such contracts.

THE REGISTRY SYSTEM

41. A registration system, to be known as the Personal Property Registry, is hereby established for the purposes of registration under this Act and for registrations that are authorized or required under any other Act to be made in the registry.

42.-(1) The Minister of Justice shall appoint an official, to be known as the Registrar of Personal Property Security, and any deputy registrars that may be required for the proper operation of the registry.

(2) The registrar shall, under the direction of the Minister of Justice, supervise the operation of the registry.

(3) The registrar may designate one or more persons or deputy registrars on the staff of his office to act on his behalf.

Definitional Cross-References:

"registrar" - s.2(ii)
"registry" - s.2(jj)

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1. The Role of the Personal Property Registry
2. A Central Computerized Registry

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1. The Role of the Personal Property Registry

The Personal Property Registry established by sections 41 and 42 is the mechanism for providing public disclosure by registration of the existence or potential existence of security interests and deemed security interests, writs of execution, garage keepers' liens and the ownership rights of buyers who have left goods in the hands of sellers. The detailed requirements for registration of each type of interest are set out in The Personal Property Regulations.[1] The integration of registration facilities is not parallelled by an integration of priority structures. The Registry serves only as a mechanism for providing public disclosure. The priority rules relative to each of the above-noted interests are to be found in the legislation that provides for the registration of it. See The Personal Property Security Act (security interests and deemed security interests); The Executions Act[2] (writs of execution); Federal Court Act[3] (federal and provincial writs of execution); The Garage Keepers Act[4] (garage keepers' liens); The Sale of Goods Act[5] and The Factors Act[6] (buyers' ownership interests).

2. A Central Computerized Registry

The Personal Property Registry is centralized in Regina at 1874 Scarth Street. All documents to be registered in the Registry must be sent or delivered to this address. The records of the Registry are stored in a computer data base which currently can be accessed only from the Registry office in Regina.[7] The system has been designed to permit remote access when, in the future, circumstances warrant. For a detailed discussion of the operation of this system, see R.C.C. Cuming "Modernization of Personal Property Security Registries: Some Old Problems Solved and Some New Ones Created" (1983-84), 48 Sask. Law Rev. 189.

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[1] R.R.S. c. P-6.1, Reg. 1 (see Appendix A).

[2] R.S.S. 1978, c. E-12, ss. 2.1 and 2.2, as amended S.S. 1978-80, c.24, s.3.

[3] R.S.C. 1970, 2nd Supp. c.10, s.66(3).

[4] R.S.S. 1978, c. G-2, ss. 16 and 18, as amended S.S. 1979-80, c.81, s.3.

[5] R.S.S. 1978, c. S-1, ss. 26(1.1) and 26(1.2), as amended S.S. 1979-80, c.39, s.4.

[6] R.S.S. 1978, c. F-1, s.9, as amended S.S. 1979-80, c.26, s.4.

[7] The Saskatchewan Government Insurance Corporation has direct access to the data base because of its need to have accurate information as to interests in damaged or destroyed vehicles in respect of which insurance payments are made.

REQUISITION OF SEARCH

43.-(1) Upon payment of the prescribed fee in the prescribed manner, any person may, in person at the office of the registry in Regina or by mail:

(a) requisition a search against the name of any individual or business debtor or according to the serial number of the collateral, if the collateral is required by the regulations to be described by serial number, and obtain the results of the search;

(b) requisition the printed results of the search mentioned in clause (a);

(c) obtain a certified copy of any registered document.

(2) Upon payment of the prescribed fee in the prescribed manner, a deputy registrar employed at a place other than Regina shall requisition, by telephone, telegraph message or mail:

(a) verbal or printed search results of a search against the name of any individual or business debtor or according to the serial number of the collateral, if the collateral is required by the regulations to be described by serial number;

(b) a certified copy of any registered document.

(3) Where verbal search results are requested and the results of the search are, in the opinion of the registrar, of such length as to preclude verbal search results, the registrar may, after informing the person searching of his decision, forward by mail the printed results of the search.

(4) Requisitions authorized by subsection (2) may be made by persons other than the deputy registrar with the approval of the registrar.

(5) Where so approved by the Minister of Justice, searches may be requisitioned and provided in a manner other than that provided in subsection (1) or (2).

(6) The results of any search conducted under this section may contain information actively maintained for inquir-

ies in the registry and may include information corresponding to search criteria similar to that provided by the person requisitioning the search.

(7) A printed search result is issued under clause (l)(b) or (2)(a) or subsection (3) is receivable in evidence as prima facie proof of its contents.

(8) A copy of any registered document certified by the registrar, or by a deputy registrar designated to do so, is receivable in evidence as prima facie proof for all purposes, without proof of his signature or official position.

Definitional Cross-References:

"collateral" -s.2(f)
"debtor" - s.2(k)
"person" - s.2(cc)
"prescribed" - s.2(dd)
"registrar" - s.2(ii)
"registry" - s.2(jj)

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1. Obtaining Search Results
2. Search Criteria and the Extent of Disclosure

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1. Obtaining Search Results

A search of the Registry may be obtained by request made in person at the Regina office, by mail (using the prescribed Registry form - Search Request (Form PPR216)) or by telephone from a judicial centre other than Regina or from any other location. However, a telephone search from other than a judicial centre can be obtained only by a person who has an account with the Registry.

Search results are issued in two forms: verbal and printed. A verbal search result will be sought when there is need to circumvent the delay involved in securing a printed search result through the mail. A person who obtains a verbal search result runs the risk of any error that occurs when information is transmitted by telephone. Section 53 gives a right of action against the Registrar for loss resulting from reliance on a printed search result that is incorrect because of an error in the operation of the Registry. No similar right of action is allowed under the Act where incorrect information is verbally transmitted to a searching party. Further, section 53(12) bars any action at common law based on negligent misrepresentation.

2. Search Criteria and the Extent of Disclosure

Section 43(1) permits the requisition of a search result using as search criteria the name of the debtor and/or the serial number of the collateral if the collateral is of a kind required by the regulations to be described by serial number.

The provisions of section 43(1) must be read in the light of the now substantial body of case law in Saskatchewan that decides what constitutes sufficient compliance on the part of a registering party with the requirements of The Personal Property Regulations such that a registration is not "seriously misleading" within the meaning of section 66(1) of the Act. The registration requirement of the Regulations and cases dealing with them are examined in the commentary accompanying section 44.

The following are some of the precautionary measures that should be taken into consideration when seeking to determine whether or not a financing statement has been registered indicating an interest or potential interest in personal property:

i) Follow the directions given in the Inquiry Guide issued by the Personal Property Registry.

ii) Determine whether the person against whose name a search is to be conducted is an individual debtor or a business debtor as described in section 35(2) of the Regulations. When in doubt, request a search under The Business Names Registration Act. A search of the name as an individual debtor and as a business debtor should be requested.

iii) When requesting a search of the name of a corporation that may have a French version or a combined French-English version of its name, obtain search results using all versions as search criteria.

iv) When using an individual debtor name with two first names, conduct two searches each with the first names of the debtor in reverse order of the other.

v) When collateral involved is one of the following, obtain search results using *in addition* to the debtor name, the serial number of the collateral. Serial number registration is required only when the specified types of goods are held by the debtor (presumably at the time the security interest is taken) as equipment or consumer goods. No serial number description is required with respect to a security interest in goods held by the debtor as inventory. See sections 2(h), 2(n) and 2(w) of the Act and sections 2(3) and 5(1) of the Regulations. Consequently, a serial number search will not reveal a security interest taken in the goods at the time the debtor held them as inventory. This is so, even though at the time of the search the debtor held the goods as equipment or consumer goods. The types of goods for which serial number registration is prescribed are: a motor car, a motor home, a mobile home, a trailer, a motorcycle, a pedal bicycle with motor attachment, a snowmobile, a snow plane, a power unit, a truck, a bus and a van. See section 5(1)(i) of the Regulations.

Where an aircraft is involved, the search criterion used should be the registration mark prescribed in the Canada Ministry of Transport (delete the hyphen in the registration mark). A financing statement registering a security interest in an aircraft must contain this mark if the registration is to be valid.

vi) Registration may be adequate even though it is not technically correct in every respect. A close similar match to the search criterion may provide sufficient disclosure of the security interest. See section 66(1).

vii) A currency date as it appears on the search result indicates the date after which affected security interests may exist and not be disclosed. See the commentary accompanying section 44(1).

viii) In addition to the situations described in (ix) and (x), there are situations in which a single search result of the registry may not be adequate. Under section 49 of the Act, when a debtor changes his name or transfers his interest in the collateral to someone else, the secured party is required to amend his registration within 15 days after he becomes aware of an actual or pending change of name or transfer of interest by the debtor. Accordingly, there will be at least a 15-day period during which a search result based on the name of the person in possession of the collateral will not disclose the registration, if as a result of a change of name by the debtor or a transfer by the original debtor to the person in possession of the collateral, the name used is different from that recorded on the original registration.

Since an amendment to the original registration is required only after the secured party learns of the actual or pending change of name or transfer of collateral, the period during which a debtor name search may be misleading could well be longer than 15 days. No difficulties should be encountered in cases where the collateral involved is of a kind that must be described in the original registration by serial number.

ix) If the collateral is intangibles or goods held by the person in possession in the form of equipment or as inventory leased or held for lease to others, and is of a type that is normally used in more than one jurisdiction, the proper place to conduct the search is in the jurisdiction where the debtor resides or has resided at any time during the last several years. When in doubt, conduct the search in the jurisdiction where the debtor now resides and then conduct a second search in the same jurisdiction more than 60 days after the original search. See section 7(1)-(4).

x) Apart from the situation described in (viii) above, if the collateral is other than that mentioned in (ix) and the searching party intends to buy the goods from the person in possession, a single search of the Personal Property Registry using the appropriate search criteria as described above is adequate. However, if the search is conducted by or on behalf of anyone else, such as a credit grantor considering the granting of credit to the person in possession of the collateral, two searches with an interval of more than 60 days between them will be required to ensure full disclosure of any foreign security interests in the goods. See section 5(2).

xi) It is important to recognize that a security interest can be perfected by the secured party taking possession of it. Accordingly, the absence of any indication of a security interest on a search result does not establish conclusively that collateral is not subject to a perfected security interest. See section 24.

xii) There are situations other than those mentioned above in which a security interest in collateral may be perfected even though its existence is not disclosed in a search result. In all such situations the period of perfection without registration or possession by the secured party is limited to 15 days. In no situation can the security interest have priority over a good faith buyer or lessee who acquires his interest for new value and without actual notice of the security interest and who takes possession of the collateral. See sections 21(a), 26, 28(3), 29(5).

30(5) and 34(1).

xiii) A security interest in goods in the hands of a bailee can be perfected by having the bailee issue to the secured party a negotiable document of title or by acknowledging that he holds the goods on behalf of the secured party. Such a security interest need not be registered in order to be perfected and a search result will not disclose its existence. See section 27. Information as to the existence of a security interest in the hands of a bailee must be obtained from him. Generally, he has a common law duty to ensure that any response he gives to an inquiry is honest and not negligently given. There is, however, no legal obligation on him to respond to an inquiry.

xiv) Where goods are involved that have attached to them other goods which are accessions at common law, a search result based on the name of the person in possession of the goods or based on the serial number of the other goods will not disclose the existence of a security interest in the accession goods unless the person in possession of the goods is also the debtor under the security agreement providing for the security interest in the accession goods. See section 37.

xv) For an explanation of the interrelationship between the system for taking and perfecting security interests in fixtures and The Land Titles Act where fixtures are involved, see the discussion accompanying section 36.

Search results are divided into two parts:

(a) exact matches; and
(b) similar matches.

Exact matches are determined to be exact by the computer. There is no choice as to whether or not exact matches will be revealed on the search results.

The computer also provides a list of matches which are found to be similar to the search criterion given by the computer according to a coding programme. At the present time the operator at the terminal determines which of the matches are sufficiently similar to warrant inclusion on the search results. Subsection 43(6) authorizes the inclusion of similar matches.

The on-site limit for printing search results is 20 pages. If a search result is greater than 20 pages, it has to be printed off-site overnight and either picked up the next day from the Registry or mailed from the off-site print location.

TIME OF REGISTRATION

44.-(1) A financing statement or financing change statement may be tendered for registration, by personal delivery or by mail, at the office of the registry in Regina, and the registration of the document is effective from the time assigned to the document by the registrar.

(2) Except as otherwise provided in this Act, a financing statement may be registered at any time and may be registered before a security agreement is made or before a security interest attaches.

Definitional Cross-References:

"financing change statement" - s.2(o)
"financing statement" - s.2(o)
"registrar" - s.2(ii)
"registry" - s.2(jj)
"security agreement" - s. 2(mm)
"security interest" - s.2(nn)

1. Method and Date of Registration
2. Contents of a Financing Statement - Test of Validity
3. Features of the Registration Requirements
4. Pre-agreement Registration
5. Registration Verification

1. Method and Date of Registration

Section 44 prescribes the methods through which financing statements and financing change statements can be tendered for registration. Two methods are available: personal delivery to the Registry Office in Regina and delivery by mail. Documents presented at the counter in the Registry Office in Regina are processed in the order in which they are received. Documents are allocated registration times and dates on a chronological basis in the order in which they are received and processed. Documents received through the mail on a particular day are all given the same time and date. All morning mail is given the time of 10:00 a.m. The time allocated to mail received after the registry opens is determined by a time clock. All of the afternoon mail is given the time of 1:00 p.m. Registration of a document occurs when this time and date is allocated. While all documents are given different registration numbers according to the time of receipt or processing, it is the "time assigned to the document by the Registrar" that is identified by section 44 as the relevant factor in determining the order of registration.

Legal registration of a document and its entry into the data base of the Registry are not co-terminous. A document may be registered so as to establish priority even though the existence of the registration could not be discovered through a search of the Registry. Every search result contains on it a "currency date" indicating the date up to which the result discloses all registered documents. In effect this is a warning that there may be other documents registered after this date that are not yet searchable but are nevertheless validly registered.

A secured party who wants to be guaranteed a first priority based on time of registration must delay the release of money or the grant of credit until he can obtain a search result showing that his registration has the priority status he expected it to have. Section 44(2) facilitates credit grantors and reduces the need for such delay by allowing a person to register a financing statement before a security agreement is executed.

A buyer of the debtor's property who wants to take full advantage of the protection granted by the registry system must delay the transfer of his consideration until he can obtain a search result indicating that no interest was registered prior to the time that title to the property was transferred to him.

A creditor extending unsecured credit, unlike a secured creditor or buyer, cannot protect himself. His priority status dates from the point that he causes the collateral to be seized under a judgment enforcement measure (section 20(1)(b)), or in the case of an execution creditor, from the time he registers his writ as provided in section 2.2 of The Executions Act.[1] Accordingly, there is no way that he can take steps to establish a priority position before advancing credit to the debtor.

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[1] R.S.S. 1978, c. E-12, as amended S.S. 1979-80, c.24, s.3. And see ss. 12-14 of The Personal Property Regulations.

2. Contents of a Financing Statement - Test of Validity

The requirements dealing with the contents of financing statements and financing change statements are set out in the Personal Property Regulations (See Appendix A).

An issue that has frequently come before Saskatchewan courts since the Act came into force is whether or not in a particular situation non-compliance with the registration requirements of the Personal Property Regulations renders the registration of a financing statement invalid. Section 66(1) of the Act provides that the validity or effectiveness of a financing statement is not affected by a defect, irregularity, omission or error in it or in the registration of it unless the defect, irregularity, error or omission is seriously misleading. Accordingly the test in each case of alleged non- compliance is whether the deficiency in the registered instrument is such as to be seriously misleading. The courts have not yet settled the question as to whether the test prescribed by section 66(1) is an objective test or a subjective test. This matter has yet to come before the Court of Appeal. Some Queen's Bench decisions have held that in order for a defect to invalidate a registration, there must be evidence that some person was actually misled by the error or omission in the registered document.[2] Others have held defective registration invalid without evidence that anyone was actually misled.[3] It is difficult to support the view that the section specifies a subjective test given its wording and the difficulties in applying a subjective test when a trustee in bankruptcy is seeking to have a registration subordinated on the grounds of non-compliance with the Regulations.

In deciding whether or not there has been a non-compliance with the registration requirements of the Regulations, it is important to consider the way in which the programme of the Registry codes information and discloses it in printed search results. To a certain extent the programme has been designed to accommodate errors in the recording of information on financing statements and financing change statements by disclosing on search results close similar matches to the search criterion being used by the searching party. The result is that a searching party may have disclosed to him information which, while not exactly correct in all details, will be sufficient to give to him notice of the potential existence of a security interest in the property about which he is concerned. For example in *International Harvester Credit Corporation of Canada Limited* v. *Frontier Peterbuilt Sales Ltd.*,[4] the Court of Queen's Bench held that a serial number recorded on a financing statement as "20416" was not seriously misleading when the correct serial number of the motor vehicle in question was "E2327HGA20416". A search of the Registry using the correct serial number as the search criterion would have disclosed the registration as a similar match. The search result would have disclosed to the searching party that a truck of the same year, make and model as the one that the searching party was interested in and one having a serial number that in some respects matched the serial number as that vehicle was collateral under a security agreement. Accordingly a reasonable person using the correct serial number of the vehicle would not have been misled by the failure to record the full serial number on the financing statement.[5] For a full discussion of the operation of this feature of the Personal Property Registry, see R.C.C. Cuming, "Modernization of Personal Property Security Registries: Some Old Problems Solved and Some New Ones Created" (1983-84), 48 *Sask. L. Rev.* 189.

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[2] *Ford Credit Canada Limited* v. *Percival Mercury Sales Ltd.*, [1984] 5 W.W.R. 714 (Sask. Q.B.), aff'd on other grounds [1986] 6 W.W.R. 569 (Sask. C.A.); *International Harvester Credit Corporation of Canada Limited* v. *Bell's Dairy Limited* (1984), 35 Sask. R. 187 (Q.B.), rev'd on other grounds [1986] 6 W.W.R. 161 (Sask. C.A.); *Elmcrest Furniture Ltd.* v. *Price Waterhouse* (1985), 41 Sask. R. 125 (Q.B.).

[3] *Re Barous* (1983), 29 Sask. R. 6 (Q.B.); *J.I. Case Credit Corp.* v. *Kerrobert Credit Union Ltd.*, [1984] 3 W.W.R. 471, 31 Sask. R. 243 (Q.B.); *Canadian Imperial Bank of Commerce* v. *Federal Business Development Bank* (1984), 32 Sask. R. 77 (Q.B.).

3. Features of the Registration Requirements

Set out below are some points that are relevant to the issue as to whether or not specific features of the Regulations have been complied with. The list is not intended to be exhaustive. The comments are based on the state of the law as established by decisions of courts as of the date of publication of this handbook. As noted above, a number of important matters connected with the Registry have yet to be finally resolved by Saskatchewan courts.

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[4] [1983] 6 W.W.R. 328, 28 Sask. R. 48 (Q.B.).

[5] See also *Leaseway Autos Ltd.* v. *Sinco Sportswear Ltd.* (1985), 45 Sask. R. 254 (Q.B.) in which the court held that failure to include "Ltd." in the name of a corporate debtor on a financing statement was not seriously misleading because a search using the full name of the corporation would reveal the registration or a close similar match.

(a) The debtor name: Failure to include the debtor name in the proper line can result in an invalid registration. Recording an individual debtor name in the business debtor line (E) or recording a business debtor name in the individual debtor line (D) results in invalid registration.[6]

(b) The general collateral description: The Saskatchewan Court of Appeal has decided that collateral may be described as "equipment" if it is held by the debtor as equipment.[7] While the Court has not yet ruled on the matter, it appears to follow that the descriptions "inventory" and perhaps, "consumer goods" may be used as well. For a definition of these terms, see sections 2(h), 2(n) and 2(w) of the Act. Note that the sections define these types of collateral in terms of the use being made of them by the debtor. Where one of these terms is used, the registration may well be rendered invalid upon a change in use of the goods by the debtor. In order to avoid invalidation on this basis, goods should be described in generic terms (e.g. automobile, farm equipment, dry goods, cattle, horses, furniture, farm machinery parts, etc.).

(c) Serial number description requirements: Under the Regulations, when a motor vehicle, trailer, mobile home or airplane (for definitions of these terms, see section 2(3) of the Regulations) is being used by the debtor at the time of registration as consumer goods or equipment (as defined in sections 2(h) and 2(n) of the Act), the collateral must be described by serial number, or in the case of an airplane, by Ministry of Transport registration marks. The reason for requiring registration by serial number is to provide a reliable search criterion when the searching party is dealing with a transferee from the debtor and consequently cannot discover the existence of a registration through the use of the name of the transferee.

The Court of Appeal has held that when the serial number of collateral which must be described by serial number is properly recorded on a financing statement, failure to include the debtor's name as required by sections 5(1) and 35 of the Regulations does not result in the invalidation of the registration.[8] Judicial comments in this decision indicate that failure to include the serial number when this is required would result in invalidity even though the debtor's name is accurately recorded.

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[6] *Re Barous, supra,* footnote 3.

[7] *Touche Ross Ltd.* v. *Royal Bank of Canada,* [1984] 3 W.W.R. 259, 31 Sask. R. 131 (Sask. C.A.).

[8] *Ford Credit Canada Ltd.* v. *Touche Ross Limited,* [1986] 6 W.W.R. 569, 50 Sask R. 268 (Sask C.A.).

(d) All present and after-acquired property collateral descriptions: Section 5(1)(j) of the Regulations provides that "in the case of a security interest taken in all of the debtor's present and after-acquired property" the collateral description on the financing statement is sufficient if the collateral is described as all present and after-acquired property. If an agreement and financing statement contain such a provision, there is no need to include an additional collateral description on the financing statement for either original collateral or proceeds. Any additional property acquired by the debtor during the life of the registration, whether as additional original collateral or as proceeds from the dispositions or dealing with the original collateral, falls within the collateral description. There is one important exception. When the collateral is either original collateral or proceeds and is of a type which under the Regulations must be described by serial number, an "all present and after-acquired property" description will not be adequate to register a security interest in the collateral.

An issue that has yet to be addressed by the courts is whether or not an "all present and after-acquired property" description on a financing statement is valid when the security agreement gives to the registering party a security interest in only specific types or items of collateral. Section 5(1)(j) of the Regulations suggests that such a registration would be invalid. But see R.C.C. Cuming, "Modernization of Personal Property Security Registries: Some Old Problems Solved and Some New Ones Created" (1983-84), 48 *Sask. L. Rev.* 189, at 224-225.

(e) *Proceeds:* The Act requires that proceeds claimed be described on the financing statement. See section 28(2) of the Act and section 5(2) of the Regulations. However, a proceeds collateral description is not required if the proceeds are of a type or kind which falls within the original collateral description, or if the proceeds are "cash proceeds" as defined in section 2(ee) of the Act. Section 5(1)(f) of the Regulations requires that a claim to proceeds be indicated on line J of the financing statement. This is in addition to the requirement, where applicable, that proceeds collateral be described on lines R and S or lines K to N on the financing statement. In a recent decision the Court of Appeal considered whether or not compliance with section 5(1)(g) is necessary when cash proceeds are involved,[9] but found it unnecessary to decide this issue.

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[9] *Central Refrigeration & Restaurant Services Inc.* v. *Canadian Imperial Bank of Commerce* (1986), 47 Sask. R. 124.

4. Pre-agreement Registration

Section 44(2) makes it clear that a financing statement can be registered before or after a security agreement has been executed. Since the date of registration can be the determining factor in priority (see, e. g., section 35(1)), early registration of a financing statement can be an important consideration. In order to be effective in giving priority, however, the financing statement must contain a collateral description that is sufficiently broad or accurate to describe the collateral taken under any subsequent security agreement. Where the collateral is of a type which must be described by serial number, this may be difficult to do.

A single financing statement, if adequately prepared, can effectively register security interests taken under one or more security agreements or amendments to security agreements.[10]

The right to register a financing statement can be abused since under the Regulations the signature of the person named as a debtor on a financing statement need not appear on the document. Sections 50(3) and 64 provide safeguards against this type of abuse. See the commentary accompanying these sections.

5. Registration Verification

Upon the entry of data from a financing statement or financing change statement into the data base of the Registry, a verification statement is automatically produced. This contains the essential information concerning the registration: the registration number (for future reference to the registration), the date and time of registration, and a description of the secured party, the debtor and the collateral. This information is in the exact form as it is stored in the data base and in the form that it will be disclosed on a search result.

A verification statement produced in connection with a particular registration is sent to the secured party or, where a registrant code or full name appears on the financing statement or financing change statement to which the registration relates, to the registrant. See section 31 of the Regulations.

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[10] *Trans Canada Credit Corp. Ltd.* v. *Royal Bank of Canada* (1985), 38 Sask. R. 274 (Q.B.); *Borg-Warner Acceptance Canada Ltd.* v. *Federal Business Development Bank*, [1987] 1 W.W.R. 744, 52 Sask. R. 81 (Sask. C.A.).

Any time a registration is totally discharged, a discharge verification statement is sent to both the secured party and registrant. See section 31(2) of the Regulations. This is an important feature of the system which gives the registering party an opportunity to take advantage of the rights given to him by section 35(5) to avoid loss of priority where his registration has been fraudulently or inadvertently discharged.

The primary function of a verification statement is to provide a registering party with an opportunity to compare the information contained in the registry data base relative to his registration with the information he wants to have in the registry data base relative to his security interest. A financing change verification statement is attached to the verification statement. This form may be used (in place of a regular financing change statement) to correct any errors in the registered information made by the registry staff or to amend information contained on the financing statement which was the basis of the registration. The verification financing change statement can be used as well to discharge a registration.

FINANCING CHANGE STATEMENT WHERE SECURED PARTY HAS ASSIGNED INTEREST

45.-(1) Where a financing statement is registered and the secured party has assigned his interest, a financing change statement in the prescribed form may be registered.

(2) Where a part of the collateral is assigned, the financing change statement shall so indicate and shall contain a prescribed description of the assigned collateral.

(3) Where no financing statement has been registered with respect to a security interest and the secured party has assigned his interest, a financing statement may be registered in which the assignee is disclosed as the secured party.

(4) After disclosure of an assignment or registration of a

financing change statement under this section, the assignee is the secured party.

(5) A financing statement disclosing an assignment may be registered before or after an agreement to assign the security interest has been completed.

Definitional Cross-References:

"collateral" - s.2(f)
"financing change statement" - s. 2(o)
"financing statement" - s.2(o)
"prescribed" - s.2(dd)
"secured party" - s.2(kk)
"security interest" - s.2(nn)

Section 15(2) of the Regulations provides that when a secured party has assigned his interest and wishes this fact to be recorded in the Registry, Financing Change Statement A is to be used.

While the matter is not entirely free from doubt, sections 45(1) and (2) do not appear to be mandatory (compare section 49 which prescribes mandatory registration requirements when the debtor changes his name or assigns his interest in the collateral). When a secured party assigns all or only a part of his interest in collateral, the failure to correct the registry so that it displays this fact should not render the security interest invalid. The failure to record an assignment of a secured party's interest would not seriously mislead anyone who conducts a search of the Registry.[1] The search criteria which must be used to conduct a search are the debtor's name and, where appropriate, the serial number of specific items of personal property. Accordingly, the failure to amend the registration to disclose the assignee of the secured party's interest does not prevent the registration from being disclosed on a search result. Under section 18 a person served with a demand for information concerning a registration in which he is disclosed as the secured party is under legal obligation to disclose the identity and address of his successor in interest if he no longer has a security interest in the collateral in question. Accordingly, a third party has the ability to obtain the name and address of an assignee through the secured party of record.

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[1] When determining the outcome of this question, one cannot employ the test of section 66(1) since this section applies only to a deficiency in a registered document and not to the failure to register a document. However, many of the same considerations involved in the application of section 66(1) apply to this question.

Section 45(3) contemplates a situation in which there has been no original registration before the assignment. For example, if a dealer sells an automobile under an instalment sales contract and immediately sells the chattel paper to a bank or acceptance corporation, it is most unlikely that the dealer will have registered his security interest before transferring the chattel paper to the financing institution. In such a case, the financing institution may register a financing statement in which it is named as the original secured party, and it is therefore not necessary for it to have the dealer register a financing statement and then register a financing change statement indicating the transfer of the chattel paper to it.

Section 45(4) must be read in context. The section provides that after the registration of a financing change statement disclosing an assignment, the assignee is the secured party. This applies only with respect to registration matters and the rights of third parties associated with information in the Registry. The fact that a financing change statement has been registered does not alter the legal relationship between the parties to the security agreement and to the assignment. Accordingly, if a financing change statement has been registered indicating an assignment of a security interest but in fact no such assignment occurred, the assignee becomes the secured party for the purposes of section 18 and is under obligation to disclose the nature of his interest in collateral that is the subject matter of an inquiry. If no assignment occurred, he has no interest; but he is under obligation to disclose this fact. Further, any notice under section 50(4) that is sent to the assignee would be effective with the result that the registration might lapse if the appropriate action is not taken to preserve it. See section 50(4).

Section 45(5) parallels section 44(1) by allowing the registration of a financing statement disclosing an assignment even before the assignment actually occurs. However, as a result of section 45(4) there may be important legal consequences associated with preregistration of a financing change statement disclosing an assignment that may place the true secured party's interest in jeopardy.

AMENDMENT TO FINANCING STATEMENT

46. An amendment, in the prescribed form, to a financing statement or other document registered under this Act may be registered at any time during the period that the registration of the amended document is effective, and the amendment is effectively registered as to the change from the time of registration of the amendment.

Definitional Cross-References:

"financing statement" - s.2(o)
"prescribed" - s.2(dd)

The notice registration system of the Personal Property Registry is designed to be flexible. A financing statement may be registered before a security agreement is executed (section 44(2)), and a single financing statement can perfect security interests taken under several security agreements or amendments, modifications or extensions of security agreements.

Section 46 extends this flexibility by giving to a secured party the right to amend a registration by adding new information. Amendments are made by registration of the appropriate financing change statement (see sections 15 to 29 of the Regulations). However, an amendment that adds information crucial to the priority structure has effect only from the time when the amendment is actually registered. This limitation will have its most significant effect in the context of amendments to collateral descriptions in registrations. If a financing statement has been registered containing a collateral description that turns out to be too narrow for the purposes of further dealings between the parties, the description can be amended to broaden it, but a security interest in the new collateral is not perfected by registration until the date of registration of a financing change statement which amends the registration.

The fact that a registration has been amended is disclosed on a printed search result. Consequently, a searching party is informed as to the time that changes in the original registration have been made.

FINANCING CHANGE STATEMENT WHERE SECURED PARTY HAS SUBORDINATED INTEREST

47. Where a secured party has subordinated his interest to the interest of another person, a financing change statement may be registered at any time during the period that the registration of the subordinated interest is effective.

Definitional Cross-References:

"financing change statement" - s.2(o)
"person" - s.2(cc)
"secured party" - s.2(kk)

Section 39 permits one secured party to subordinate the priority status of his security interest to the security interest of another person (the senior creditor). Section 47 permits the subordinating secured party to register a Financing Change Statement A that amends the original registration so as to disclose the existence of the subordination agreement. The section is not restricted to a subordination to another secured party: the amendment of the registration may disclose subordination of a security interest to the claim of any person. This might include an unsecured creditor of the common debtor.

Registration of a financing change statement disclosing a subordination is not mandatory; failure to do so does not have any effect on the validity of the security interests involved or on the subordination arrangement. The reason for this is that the subordination does not affect the priority status of either party to the arrangement relative to other parties. It has *inter partes* effect only.

If the subordination agreement is in substance a security agreement (an agreement between the subordinating creditor and the senior creditor which provides for an interest in the subordinating creditor's security interest to secure a debt owing by the debtor to the senior creditor, registration of a financing change statement under section 47 would not perfect the security interest created by the subordination agreement. Here the issue is registration to protect the interests of creditors and persons dealing with the subordinating creditor. A registration based on the subordinating creditor's name would be required if such persons were to be given the opportunity to discover the existence of a security interest in the subordinating creditor's security interest.

The Regulations make no provision for the discharge of the registration of a subordination without a complete discharge of the registration to which the subordination relates. However, it is possible to reverse the registration of the subordination by the registration of a financing change statement indicating the subordination of the senior creditor's interest to that of the original subordinating party.

A financing change statement indicating the subordination of one security interest to another is linked to the registration of the senior creditor's security interest and will be removed from the Registry records when the registration of the senior creditor's security interest is discharged or lapses.

RENEWAL AND REMOVAL OF REGISTRATION

48.-(1) Where a financing statement has been registered with respect to a security interest, the registration may be renewed at any time before the document to which it refers expires by registering a financing change statement.

(2) Subject to the regulations, registration under this Act of:

(a) a financing statement is effective for the length of time indicated on the financing statement;

(b) a financing change statement renewing the registration is effective for the length of time indicated on the financing change statement;

(c) any other document is effective for the remainder of the period for which the financing statement to which the document relates or any financing change statement is effective.

(3) Financing statements and financing change statements

referring to a financing statement, or information provided on a financing statement or financing change statement, as the case may require, may be removed from the records of the registry:

(a) when the financing statement is no longer effective;

(b) upon the receipt of a financing change statement discharging or partially discharging the financing statement;

(c) when the secured party fails to register a judge's order maintaining the financing statement under subsection 50(4);

(d) upon receipt of a court order compelling the discharge or partial discharge of a financing statement or a financing change statement.

Definitional Cross-References:

"court" - s.2(i)
"financing change statement" - s.2(o)
"financing statement" - s.2(o)
"judge" - s. 2(x)
"registry" - s.2(ii)
"secured party" - s.2(kk)
"security interest" - s.2(nn)

Section 48(2) provides legislative authority for section 5(1)(b) of the Regulations which permits a registering party to select for the duration of his registration (registration life) any period between one and twenty-five years or infinity. A registration life can be extended beyond the original period by registration of a Financing Change Statement A indicating an additional registration life. However, in order for such a registration to be effective in extending the original registration and thereby perpetuating the priority status of a security interest covered by the registration, the financing change statement must be registered before the initial registration life has expired. See section 48(1). Any registration effected after the expiry of the initial registration life is treated as an entirely new registration with the result that any security interest to which it relates has registration priority only from the date the new registration is effected. Section 23 of the Act which refers to continued perfection through different methods of perfection does not affect the operation of section 48(1).[1]

There is one exception to the general rule in section 48(1). When a registration lapses or has been discharged fraudulently, in error or without authorization, a secured party may "reregister" his security interest within 30 days after the lapse or discharge without loss of priority status in relation to competing interests in the collateral which arose prior to the lapse or discharge, except with respect to advances made by a holder of competing security interests made or contracted for following the lapse or discharge and prior to re-registration. See section 35(5). This important exception to the limitation of section 48(1) makes it possible for a secured creditor to protect himself against fraudulent discharge of his registration, and also allows him an opportunity to avoid loss of priority due to a careless or inadvertent discharge or lapse of a registration.

The right given in section 48(2) to have a financing statement registered for a period chosen by the registering party is qualified in section 48(3). A registering party cannot maintain a registration that does not relate to an existing security agreement after a demand by a person with an interest in the collateral described in the registration that the registration be discharged. See section 50. If the registering party fails to discharge the registration, it can be "lapsed" by the registrar pursuant to section 50(4) or discharged by court order pursuant to section 18(5) or section 50(6).

All information entered in the Registry data base can be retrieved and reconstructed on "hard copy". All registered documents are currently being retained on microfiche.

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[1] A Manitoba Queen's Bench decision to the contrary (*General Motors Acceptance Corporation of Canada Ltd.* v. *Bank of Nova Scotia* (1983), 3 P.P.S.A.C. 63) was specifically rejected by the Saskatchewan Court of Queen's Bench in *Saskatoon Credit Union Limited* v. *Bank of Nova Scotia*, [1985] 6 W.W.R. 556, 42 Sask. R. 187. See also *Moose Jaw* v. *Pulsar Ventures* (1986), 43 Sask. R. 247 (Q.B.).

TRANSFER OF DEBTOR'S INTEREST, CHANGE OF NAME UNPERFECTING SECURITY INTEREST

49.-(1) Where a security interest has been perfected by registration and the debtor has the consent of the secured party to transfer his interest in the collateral or part of the collateral, the transferee is deemed to be the debtor for the purposes of registration, and the security interest is unperfected as against any interest arising subsequent to the transfer and before the secured party registers a financing change statement amending the original financing statement.

(2) Where a security interest has been perfected by registration and the secured party has notice that:

(a) the debtor has:

(i) transferred his interest in the collateral or part of the collateral; or

(ii) changed his name;

the security interest as against any interest arising subsequent to the transfer or change of name and before the secured party registers a financing change statement, is unperfected:

(iii) where the secured party has notice that the debtor has transferred his interest in the collateral or part of the collateral, 15 days after the secured party has notice of the debtor's transfer;

(iv) where the secured party has notice that the debtor has changed his name, 15 days after the secured party has notice of the debtor's change of name;

(b) the debtor is about to:

(i) transfer his interest in the collateral or a part of the collateral; or

(ii) change his name;

the security interest, as against any interest arising

subsequent to the transfer or change of name and before the secured party registers a financing change statement, is unperfected:

(iii) where the secured party has notice that the debtor is about to transfer his interest in the collateral or part of the collateral:

(A) on the date of the transfer; or

(B) 15 days after the secured party has notice that the debtor is about to transfer his interest in the collateral or a part of the collateral;

whichever is later;

(iv) where the secured party has notice that the debtor is about to change his name:

(A) on the day the debter changes his name; or

(B) 15 days after the secured party has notice that the debtor is about to change his name;

whichever is later.

(3) This section does not have the effect of unperfecting:

(a) a prior security interest, as defined in clause 72(1)(a), registered under a prior registration law, as defined in clause 72(1)(b); or

(b) a security interest in collateral that is required by the regulations to be and is described by its serial number in a registered financing statement.

(4) A security interest that becomes unperfected under this section may thereafter be perfected by registering a financing statement or as may otherwise be provided in this Act.

Definitional Cross-References:

"collateral" - s.2(f)
"debtor" - s.2(k)
"financing change statement" - s.2(o)
"financing statement" - s. 2(o)
"notice" - s.67(3)
"secured party" - s.2(kk)
"security interest" - s.2(nn)

1. Purpose of the Section
2. Operation of the Section
3. Multiple Transferees
4. Perfection After Expiry of Grace Period

1. Purpose of the Section

Section 49 ensures that the integrity and usefulness of the registry is maintained in situations where a third party's ability to acquire information concerning the existence or potential existence of a security interest is affected by a change in the debtor's name or by a transfer of collateral Since a searching party will use the search criterion available to him (which in most cases will be the name of the person in possession or apparent legal control of the collateral the searching party is interested in), unless some obligation is placed on a secured party to amend his registration when his debtor changes his name or transfers his interest in the collateral to another person, a search result obtained on the basis of the name of the person in possession or legal control of the collateral will not disclose the registration. Section 49 imposes this obligation.

2. Operation of the Section

The section is structurally complex and can best be understood when the various matters to which it refers are separately treated.

(a) Secured party consents to the transfer of the collateral or part of it by the debtor: Where the transfer of the debtor's interest in the collateral is involved, the section draws a distinction between a situation in which the secured party consents to the transfer (and therefore knows in advance that it will occur) and a situation in which the transfer is about to occur or has occurred without his consent.

In the former situation, the transferee becomes the debtor for registration purposes as soon as the transfer occurs and the security interest becomes unperfected as against any interest arising after the transfer and before the secured party registers a financing change statement amending the registration so as to indicate the identity of the new debtor. See section 49(1).

(b) Secured party does not consent to the transfer of the collateral or part of it but becomes aware of the transfer: Where a security interest has been perfected by registration and the secured party has notice that the debtor has transferred his interest in the collateral or part of it, the security interest becomes unperfected, as against any interest in the transferred collateral arising subsequent to the transfer and before the secured party registers a financing change statement disclosing the name of the transferee as debtor, fifteen days after the secured party has notice of the transfer. As to what constitutes notice, see section 67(3).

(c) Secured party does not consent to the transfer of the collateral or part of it but becomes aware of the debtor's intention to transfer all or a part of his interest in the collateral: Where a security interest has been perfected by registration and the secured party has notice that the debtor is about to transfer his interest in the collateral or part of it the security interest becomes unperfected, as against any interest in the collateral arising subsequent to the transfer and before the secured party registers a financing change statement disclosing the name of the transferee as debtor, fifteen days after the secured party has notice that the debtor is about to transfer an interest in the collateral or on the date of the transfer, whichever is later. As to what constitutes notice, see section 67(3).

(d) Secured party becomes aware that debtor has changed his name: Where a security interest has been perfected by registration and the secured party has notice that the debtor has changed his name, the security interest becomes unperfected, as against any interest in the collateral taken under the security interest arising subsequent to the change of name and before the secured party registers a financing change statement disclosing the new name of the debtor, fifteen days after the secured party has notice of the change of name. As to what constitutes notice, see section 67(3).

(e) Secured party becomes aware that debtor is about to change his name: Where a security interest has been perfected by

> registration and the secured party has notice that the debtor is about to change his name, the security interest becomes unperfected as against any interest in the collateral arising subsequent to the change of name and before the secured party registers a financing change statement disclosing the new name of the debtor, fifteen days after the secured party has notice that the debtor is about to change has name or on the date the debtor changes his name, whichever is the later. As to what constitutes notice, see section 67(3).

The section places an obligation on the secured party, once he becomes aware of a transfer of collateral, potential transfer of collateral, a change of name or potential change of name to obtain the information necessary to ensure that the records of the registry accurately reflect the name of the person in possession or legal control of the collateral.

Section 49(3) states a minor qualification to the obligations specified in the other subsections of the section. Failure to register the appropriate financing change statement when there is a change of name of the debtor or a transfer of collateral by the debtor to another person does not result in loss of perfection where the collateral involved is of a type that is required by the Regulations to be and in fact is described in the registration by serial number.

3. Multiple Transferees

Section 49 does not address directly the question as to whether or not a secured party must register a financing change statement for each transferee where, to his knowledge, there has been one or more intervening transferees of the collateral between the original debtor and the transferee who ultimately ends up in possession or legal control of the collateral. Since the policy underlying the section is to preserve the integrity of the registry, the answer to this question will vary depending upon the particular situation in which the issue arises. Assume that SP has a perfected security interest in collateral of D. D transfers his interest in the collateral to Tr1 who then transfers his interest in the collateral to Tr2. SP discovers that D has transferred his interest to Tr1 and that Tr1 has transferred his interest to Tr2. If all of the transfers are completed before the 15-day grace period allowed to SP by section 49 has expired, there appears to be no good reason to require SP to register a financing change statement disclosing the transfer to Tr1. He must, of course, register a financing change statement to disclose the transfer to Tr2. It is only after the expiry of the 15-day period that third parties conducting searches at the registry are assured that the name of the person in possession or legal control of the collateral can be relied upon as a search criterion when obtaining a search result.

If any of the transfers occurs after the expiry of the time allowed by the section to SP to register the required financing change statement, the failure on the part of SP to register a financing change statement for each transferee will result in loss of perfection with respect to any interest in the collateral acquired from a transferee who at the time of the acquisition was not disclosed in the registry as a debtor. Accordingly, if a person acquires an interest in the collateral while Tr1 is in possession or legal control of it, the failure on the part of SP to register a financing change statement disclosing Tr1 as a debtor would result in the subordination of SP's security interest to the interest of such person. However, if the competing interest was acquired from Tr2 at a time when Tr2 was identified in the registry as a debtor, there appears to be no good reason to treat SP's security interest unperfected in relation to an interest acquired from Tr2 merely because SP failed to register a financing change statement disclosing the transfer to Tr1.

Non-compliance with the requirements of section 49 results in loss of perfection only with respect to interests in the collateral acquired after the transfer of collateral or change of name, as the case may be. In this respect, the section is consistent with section 35(5).

4. Perfection After Expiry of Grace Period

Section 49(4) provides for the perfection by registration of a security interest that has lost its perfection as a result of non-compliance with subsections (1) and (2). The section states that this is to be effected by registration of a financing statement or perfection as otherwise provided by the Act. The subsection appears to contemplate an entirely new registration and not an amendment of the original registration. However, subsection 49(2) suggests that a change of name or transfer of collateral may be registered through the use of a financing change statement that amends the original registration. Subsection (4) would therefore appear to be an alternative method of placing the new information on the registry. However, if it is used, care should be taken not to discharge the original registration. It will be required to maintain a priority position relative to other interests to which the security interest is not subordinated by section 49(1) or (2). If the original registration is discharged, the priority position of the security interest to which it relates would date for all purposes from the date of a registration of financing change statement registered pursuant to section 49(4). Priority would be lost to interests represented by registrations that were effected subsequent to the original registration.

DISCHARGE OF REGISTRATION

50.-(1) Where a financing statement is registered and the collateral or proceeds, as the case may be, is released or partially released, the secured party shall discharge the registration, wholly or partially, as the case may require, by registering a financing change statement.

(2) No financing change statement mentioned in subsection (1) shall be registered unless financing change statements in respect of all assignments by the secured party or transfers by the debtor are registered.

(3) Where a financing statement is registered under this Act and:

(a) all the obligations under the security agreement to which it relates are performed;

(b) it is agreed to release part of the collateral in which a security interest is taken upon payment or performance of certain of the obligations under the security agreement, then upon payment or performance of such obligations; or

(c) it purports to give the secured party a security interest in property of the debtor in which the secured party does not have, or is not entitled to claim, a security interest;

any person having an interest in the collateral which is the subject of the security agreement, financing statement or financing change statement may serve a written demand on the secured party, demanding a financing change statement mentioned in subsection (1), and the secured party shall sign and deliver or send to the registry the financing change together with financing change statement in respect of all assignments by the secured party or transfers by the debtor in respect of which financing change statements have not been registered, within 15 days after a service of the demand.

(4) Where the secured party fails to deliver the required financing change statements within the time provided by subsection (3), the person who has made the demand may require the registrar to serve a notice in writing on

the secured party stating that registration of the financing statement will be discharged or that a part of the collateral will be released, as the case may be, upon the expiration of 40 days after the day the registrar serves notice on the secured party, unless in the meantime the secured party registers with the registrar a judge's order accompanied by a financing change statement maintaining the registration of the interest of the secured party.

(5) The notice mentioned in subsection (3) or (4) may be served in accordance with subsection 67(1) or by registered mail addressed to the post office address of the secured party as it appears on the security agreement or financing statement.

(6) Upon application to a judge by the secured party, the judge may order that the registration of a financing statement:

(a) be maintained on any conditions and, subject to section 48, for any period of time that he considers just;

(b) be discharged or that a financing change statement releasing the collateral or part of the collateral be registered, as the case may be.

(7) Subsection (4) does not apply to an agreement registered under *The Corporation Securities Registration Act* or to a financing statement or a financing change statement registered with respect to a security interest taken under a trust indenture where the financing statement indicates that the security agreement with respect to which the financing statement was registered is a trust indenture.

(8) Where the secured party under a registration to which *The Corporation Securities Registration Act* applies or under a trust indenture fails to deliver the financing change statements demanded in subsection 50(3), the person making the demand may apply to a judge, upon notice to all persons concerned, for an order directing that the financing statement or financing change statements be removed from the registry.

Definitional Cross-References:

"collateral" - s.2(f)
"debtor" - s.2(k)
"financing change statement" - s.2(o)
"financing statement" - s.2(o)
"judge" - s.2(x)
"person" - s.2(cc)
"proceeds" - s.2(ee)
"registrar" - s.2(ii)
"registry" - s.2(jj)
"secured party" - s. 2(kk)
"security agreement" - s.2(mm)
"security interest" - s.2(nn)
"trust indenture" - s.2(pp)

1. Obligation to Discharge a Registration
2. Demand for Discharge of a Registration
3. Lapse of Registration

1. Obligation to Discharge a Registration

Section 50(1) requires the discharge or, where appropriate, the amendment of a registration when the collateral under the security agreement to which the registration relates has been discharged or partially discharged. The underlying policy of this requirement is that registrations that do not represent valid, existing security interests should not be maintained unless there are commercially valid reasons for doing so. The section may appear to conflict with another policy of the Act: to give to parties to security agreements the flexibility they require, particularly in the context of business financing transactions, and to avoid the necessity of having to register a financing statement for every security agreement they enter into over the period of time they are dealing with each other. See the commentary accompanying section 44. There are periods in the course of such business relationships during which all secured obligations have been discharged by the debtor, but the parties will want to maintain a registration to facilitate further dealings between them and to maintain the priority status that the registration affords. Section 50(1) appears to prevent secured parties from maintaining a registration for this purpose. The subsection, however, must be read in context. In the first place, subsections 50(3)-(4) provide mechanisms through which persons named as debtors in registrations can obtain the discharge of registrations that do not relate to existing security agreements. In the second place, the obligation imposed by the section is subject to a test of commercial reasonableness. See section 64(1). There is nothing commercially unreasonable about maintaining a registration after the discharge of the secured obligation to which it relates if the person named as secured party in the registration has a reasonable expectation of further dealings with the person named in it as debtor. Finally it would be anomalous if the Act were read to require discharge of a registration in such a situation in the face of an express provision in section 44 that a financing statement may be registered before a security agreement is executed and, presumably, even without any assurance that such an agreement will be executed.

It is suggested that section 50(1) should be read as requiring the discharge of a registration when it is clear to the party who effected the registration that he will have no further dealings with the person named in the registration as debtor, and that to maintain the registration may well cause inconvenience or damage to such person. See section 64(2). Such a situation will most often arise when the registration related to a single security agreement involving a specific item of collateral (for example a secured retail instalment sale of an automobile) and the obligations arising under the security agreement have been discharged.

2. Demand for Discharge of a Registration

Section 50(3) provides a mechanism for the enforcement of the obligation set out in section 50(1). Any person with an interest in collateral, including a secured creditor and an unsecured creditor who has caused the collateral to be seized as contemplated by sections 20(1)(b), is given the power to require the discharge of a registration that does not relate to an existing security agreement between the persons named as secured party and debtor in the registration or that does not reflect the true scope of the security interest(s) to which the registration relates. This subsection and subsection (4) are important safeguards against abuse of the right given to registering parties to register financing statements before security agreements are executed (section 44), to select registration periods of long duration (section 48) and to use "all present and after-acquired property" collateral description clauses when describing collateral on financing statements (see section 5(1)(j) of the Regulations). Failure to comply with a demand to discharge or amend a registration may subject the registering party to an order for payment of damages for any loss to another person that was reasonably foreseeable as liable to result from such failure. The damages could be substantial if as a result of erroneous information in the data base of the Registry, a person named as debtor in a registration is unable to obtain credit from other sources, and as a result suffers loss in the form of a lost opportunity or the imposition of a higher rate of interest than would otherwise have been the case.

The procedure to be followed when making a demand for a discharge is set out in section 43(1) of the Regulations. A form for this is prescribed, and must be executed by a person having an interest in the collateral, and not by an agent of such person.

3. Lapse of Registration

Section 50(4) gives to any person with an interest in property inaccurately identified in a registration as collateral under a security agreement the power to force discharge of the registration. When the steps prescribed by the subsection are taken the registration will automatically lapse unless maintained by a court order obtained by the person identified in the registration as the secured party. This remedy is in addition to and not in substitution for the remedy of damages made available to such person under section 64.

The lapse system does not apply to a registration made initially under The Corporation Securities Registration Act and maintained under this Act or to a registration identified on a financing statement as being related to a trust indenture. Involuntary removal of such registrations can be obtained only through a court order. See sections 50(7) and 50(8). The reason for this is that registrations relating to trust indentures should not be subject to the risk of inadvertent discharge through lapse under subsection (4). It is not the trustee who suffers the loss if a trust indenture security interest loses its priority. It is the many (and often unsophisticated) creditors of the issuer of the trust indenture who would suffer the loss. Some of the registrations carried over from The Corporation Securities Registration Act relate to trust indentures; and since it was not possible to identify these registrations when they were brought into the Personal Property Registry, it was necessary to include all Corporation Securities Registration Act registrations in the category of registrations exempt from the system of subsection 50(4).

REGISTRATION NOT CONSTRUCTIVE NOTICE

51. Registration of a document in the registry does not constitute constructive notice or knowledge of its contents to third parties.

Definitional Cross-References:

"registry" - s.2(jj)

Section 51 consigns to legal history the concept of constructive notice of registrations of security interests in personal property. It has no place in a system of the kind embodied in the Act. Constructive notice is important only in a legal system in which the rights acquired by a person depend upon whether or not the acquisition was made with or without knowledge on the part of such person. Where such person did not have actual knowledge of a prior interest, but had the ability to obtain such knowledge by conducting a search of the Registry, some courts have concluded that the person has constructive notice, although not actual notice of the prior interest.

Some of the priority rules of the Act involve the question of notice or knowledge. See sections 20(1)(e), 20(2), 30 and 31. However, it is clear that something more than constructive notice, as the concept is traditionally understood, is involved. Section 67(3) provides the definition of notice or knowledge applicable to these sections. There must be an actual communication of information under circumstances in which a reasonable person would take cognizance of it.

Apart from the priority rules contained in the above-noted sections, notice or knowledge, actual or constructive, is irrelevant except to the extent that it is an element of bad faith under section 64(1). Priority results when the prescribed steps are taken; it does not depend on whether third parties are deemed to be aware or have constructive knowledge of that fact.

DOCUMENTS AND RECORDS

52.-(1) Where, in the opinion of the registrar or deputy registrar, a document tendered for registration in the registry does not comply with this Act or the regulations or with any other Act under which registration of the document in the registry is authorized, he may refuse to register it, and shall give the reason why he is of the opinion that it does not comply.

(2) Any document that is required or permitted to be registered under this Act must be the original.

(3) For the purposes of this Act a writing is deemed to be signed by a person when it is signed by the person or his agent.

(4) A certificate of the registrar or deputy registrar designated to sign certificates is receivable in evidence as *prima facie* proof of the time of the registration of a document, without proof of his signature or official position.

(5) When directed to do so by the Minister of Justice, the registrar shall cause any document registered in the registry to be photographed on microfilm and the microfilm, for the purposes of this Act or an Act authorizing registration in the registry, is deemed to be the document registered.

(6) When directed to do so by the Minister of Justice, the registrar shall authorize the destruction of any books, documents, records, cards, papers or forms that have been preserved in the registry for so long that it appears that they need not be preserved any longer.

Definitional Cross-References:

"person" - s.2(cc)
"registrar" - s.2(ii)
"registry" - s.2(jj)

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1. Rejection of Registry Documents
2. Storage and Destruction of Documents

1. Rejection of Registry Documents

The Registrar may refuse to register a financing statement or financing change statement that does not comply with the Act or the Regulations. The reasons for rejection will relate to technical and administrative matters only. The Registrar does not determine validity. Acceptance for registration does not guarantee that the document is validly registered. This marks one of the fundamental differences between the personal property system and the land titles system.

2. Storage and Destruction of Documents

A permanent record of all documents, financing statements and financing change statements registered in the Registry is kept on microfiche in the Registry. Financing statements and financing change statements are kept for one year after registration. All pre-PPSA documents are kept for 15 years after discharge.

ACTION AGAINST REGISTRAR

53.-(1) Subject to the other provisions of this section, any person who suffers loss or damage, as a result of his reliance upon a prescribed registry document or printed search results that are incorrect because of an error in the operation of the registry, may bring an action against the registrar in the court for recovery of damages but no award of damages to any single claimant shall exceed the prescribed amount.

(2) No action for damages under this section lies against the registrar unless it is commenced within one year after the time of the person's having suffered the loss or damage.

(3) Any action for recovery of damages under this section brought by a person shall be brought as an action on behalf of all other persons who relied on the same prescribed registry document or printed search results, and the judgment in the action, except to the extent that it relates to the finding of the fact of reliance by each person and provides for subsequent determination of the amount of damages suffered by each person, constitutes a judgment between each person and the registrar in respect of an error or omission in the operation of the registry.

(4) An action for recovery of damages under this section brought by a trustee under a trust indenture or any person with an interest in a trust indenture shall be brought as an action on behalf of all persons with interests in the same trust indenture, and the judgment in the action, except to the extent that it provides for subsequent determination of the amount of damages suffered by each such person, constitutes a judgment between each such person and the registrar in respect of the error or omission.

(5) In an action brought by a trustee under a trust indenture or by any person with an interest in a trust indenture, proof that each person relied on the prescribed registry document or printed search results is not necessary if it is established that the trustee relied on the prescribed registry document or printed search results, but no person is entitled to recover damages under this section if he knew at the time he acquired his interest that the prescribed registry document or printed search results relied on by the trustee were incorrect.

(6) The total of all claims for compensation paid under subsections (3) and (4) in any single action shall not exceed the prescribed amount.

(7) In proceedings under subsections (3) and (4) the court may make any order that it considers appropriate to give notice to members of the class.

(8) Subject to subsection (6), the court may order payment of all or a portion of the damages awarded to identified members of the class at any time after judgment, and the obligation of the registrar to satisfy the judgment is

satisfied to the extent that payment is made.

(9) The Minister of Finance may, without action brought, pay the amount of a claim against the registrar when authorized to do so by the Minister of Justice on the report of the registrar setting forth the facts and the certificate of the registrar that in his opinion the claim is just and reasonable.

(10)When an award of damages has been made in favour of the claimant and the time for appeal has expired or, when an appeal is taken, it is disposed of in favour of the plaintiff, the Minister of Finance shall authorize payment out of the consolidated fund in the manner and in the amount specified in the judgment, including any costs awarded to the claimant.

(11)Where damages are paid to a claimant under this section, the registrar is subrogated to the rights of the claimant to the amount so paid against any person indebted to the claimant and whose debt to the claimant was the basis of the loss or damage in respect of which the claimant was paid, and the registrar may enforce those rights by action in court or otherwise in the name of the Crown in right of Saskatchewan.

(12)Notwithstanding *The Proceedings Against the Crown Act*, no action shall be brought against the Crown in right of Saskatchewan, the registrar or any officer or employee of the registry for any act or omission of the registrar or an officer or employee of the registry in respect of the discharge or purported discharge of any duty or function under this or any other Act or under the regulations, other than as is provided in this section.

Definitional Cross-References:

"court" - s.2(i)
"person" - s.2(cc)
"prescribed" - s.2(dd)
"registrar" - s.2(ii)
"registry" - s.2(jj)
"trust indenture" - s.2(pp)

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1. The Cause of Action
2. Who Can Bring the Action
3. Class Action
4. Limitation of Action
5. The Amount Recoverable
6. No Other Cause of Action

1. The Cause of Action

Section 53(1) gives a right of action against the Registrar to any person who has suffered loss or damage as a result of his reliance upon a printed search result or prescribed registry document that is incorrect because of an error in the operation of the registry system. Presumably the term "operation of the system" includes an error made by any employee or an error resulting from a malfunction in the computer operated data base of the Registry. The error must, however, be in a printed search result or prescribed registry document. An error in any information orally communicated to someone cannot be the basis of an action.

When a search result discloses a long list of non-exact matches, it is the practice of the Registry to select from the lists only those registrations that, in the opinion of the registry clerk dealing with the search request, are close to the search criterion or criteria used by a searching party when requisitioning the search result. This practice developed because the computer programme of the Registry will sometimes reveal a long list of names as close similar matches to a search criterion in the form of a debtor name, many of which would not appear to a reasonable person to be at all close to the search criterion used. In order to avoid the transmission of a large amount of apparently useless information to a searching party and to respond to requests by system users that "useless information not be included in search results", it is the policy of the Registry to eliminate from the search result issued in such a situation all names that do not appear to the clerk handling the search to be close similar matches.

While the matter is not free from doubt, it is unlikely that the failure on the part of a registry clerk to disclose a non-exact match which is later found by a court to be sufficiently close to the search criterion used to put a reasonable searching party on notice of the existence of a registration would be regarded an error in the operation or the Registry. There is no requirement in the Act or the Regulations that all information retrieved from the Registry data base through the computer program currently in use be disclosed on a search result. Section 43(6) provides that any search "*may* contain information actively maintained for inquiries in the registry and *may* include information corresponding to search criteria similar to that provided by the person requisitioning the search". Accordingly, it is arguably not an error in the operation of the Registry to omit some of the information that is disclosed. A searching party wishing to have the full protection of section 53 should request that his search results disclose all information revealed when the specified criterion is used.

2. Who Can Bring the Action

It is the person who has relied on an erroneous search result and who suffered loss or damage who must bring the action. Where the error in the system is the result of improper recording of the information contained on a financing statement (with the result that this information is not accurately entered into the data base of the Registry), no action can be brought by the registering party against the Registrar since the contents of the financing statement is deemed to be registered. See section 44(1). Accordingly, the registering party is not likely to ever suffer loss or damage as a result of the error. It will be a searching party who obtains a search result that does not reflect the contents of the registered financing statement who is likely to suffer the loss or damage as a result of the error.

3. Class Action

Section 53(3) provides that where more than one person has a cause of action as a result of having suffered loss or damage because of reliance on a single erroneous search result, a class action must be brought. Similarly, section 53(4) requires a class action where the person bringing the action has an interest in a trust indenture or is a trustee under a trust indenture. Presumably, the loss or damage suffered by the person with an interest in a trust indenture must in some way relate to that interest if the section 53(4) is to apply.

There are two legislative goals underlying the requirement that class actions be brought in the situations described in subsections (3) and (4). One goal is to avoid multiplicity of actions and the costs and delay that are inevitable when a large number of claimants are involved. The second reason is to provide a limitation on the liability of the Registrar with respect to a single search result or with respect to a single transaction or set of transactions. The assumption apparently underlying section 53(4) is that interests in debentures were acquired on the basis of erroneous information acquired from a search result by a trustee or by individual interest holders.

4. Limitation of Action

Section 53(2) provides a statutory bar against any action brought under the sections more than one year after the time the claimant suffered the loss or damage. It may not always be easy to determine when loss or damage is suffered. It may be viewed as occurring at the moment an interest is acquired in reliance on erroneous information contained on a search result that is subject to a registered but undisclosed prior interest. If this is the case, there is a possibility that the loss or damage may not be discovered until the fact that there exists a conflict between claims to property is discovered. This might occur after one year from the date that the interest was acquired by the claimant. The loss or damage may, however, be viewed as occurring only when the person with the prior interest asserts his priority. This approach is based on the proposition that it is the actual assertion of priority that causes the loss. If the prior interest is never asserted (if, for example, the obligation it secured is discharged), no loss results to the person who relied on the erroneous search results. In view of the approach taken to the interpretation of limitation legislation recently taken by the Supreme Court of Canada in *Kamloops* v. *Nielson*[1] it appears that the latter interpretation of section 53(2) would be more attractive to the courts.

5. The Amount Recoverable

Section 53(4) gives power to the Lieutenant Governor in Council to set by regulation upper limits on the amounts recoverable under the section in an action against the registrar. Under section 48 of the Regulations, the amounts as of March 16, 1987 that are recoverable are $300,000.00 in a single claim and $2,400,000.00 in a class action brought under subsections (3) and (4) of the Act.

6. No Other Cause of Action

Section 53(12) precludes any other cause of action against the Crown or Registry officials or employees with respect to the discharge or proposed discharge of their duties. It would appear to preclude any action in tort based on negligent misrepresentation. The scope of the protection afforded is quite broad. It is not limited to actions for loss or damage; it applies to any type of action including, presumably, an action seeking injunctive relief.

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[1] [1984] 2 S.C.R. 2.

NOTICE FILED IN LAND TITLES OFFICE

54.-(1) In order to take priority over interests in real property according to section 36, a notice in the prescribed form shall be filed in the appropriate land titles office upon payment of the prescribed fee, and upon being so filed the registrar of the land titles office shall make a memorandum thereof on the certificate of title to the parcel of land to which the notice relates and on the condominium plan or replacement plan, as the case may require.

(2) Where a notice has been filed in the land titles office under subsection (1) and the filing of the notice has not expired, notice of a document renewing, amending, assigning or discharging the security interest to which the original notice relates, or of a document subordinating the security interest to another security interest, may be filed in the land titles office in the form prescribed, and, upon such filing, the registrar of the land titles office shall make a memorandum thereof on the proper certificate of title.

(3) Section 48 applies, *mutatis mutandis*, to any notice filed under this section.

(4) A security interest in fixtures may be perfected as a security interest in goods without a notice being filed under subsection (1).

(5) Where the filing of a notice of a security interest in fixtures expires, the registrar of the land titles office may vacate the filing of the notice and any other notice that relates to the same security interest and may strike out any memorandum thereof that is made on the certificate of title.

(6) A notice filed under subsection (1) or (2) may be discharged by filing a certificate in the prescribed form in the appropriate land titles office.

(7) Where a notice is filed under subsection (1) and:

(a) all the obligations under the security agreement are performed;

(b) it is agreed to release part of the collateral in which

a security interest is taken upon payment or performance of certain of the obligations under the security agreement, then upon payment or performance of those obligations; or

(c) the notice purports to give the secured party a security interest in property of the debtor in which the secured party does not have, or is not entitled to claim, a security interest;

any person having an interest in the collateral, the registered owner of the real property or any other person claiming an interest in the real property may contest the registration of the notice according to the procedure established in *The Land Titles Act* for contesting the filing of a caveat.

Definitional Cross-References:

"collateral" - s.2(f)
"debtor" - s.2(k)
"fixture" - s.2(p)
"goods" - s. 2(s)
"person" - s.2(cc)
"prescribed" - s.2(dd)
"secured party" - s.2(kk)
"security agreement" - s.2(mm)
"security interest" - s.2(nn)

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1. Purpose of Section
2. Compliance with Registration Requirements
3. Separate Priority Regimes
4. Discharge

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1. Purpose of Section

Section 36 provides for the preservation of interests in goods after the goods have become affixed to realty in such a manner as to constitute fixtures. Section 54 prescribes the registration requirements that must be met if a security interest in a fixture is to have priority over certain interests in the realty to which the goods are affixed.

2. Compliance with Registration Requirements

A security interest in fixtures is appropriately registered in the land titles system by the registration of Form 3 as prescribed by section 45(1) of the Regulations. This form and the type of information to be recorded on it vary considerably from the form and content of a financing statement or financing change statement in the following respects:

(a) The form must be addressed and delivered to the Registrar of the land titles registration district in which the land to which the goods have been or are to be attached is located, and not to the Personal Property Registry office in Regina.

(b) The form must contain a "brief description of the collateral which is or may become a fixture". This is a different formulation of collateral description requirements than that prescribed by section 5 of the Regulations. Since it is the "collateral" and not the "type or kind" of collateral that is to be described, it appears that a more detailed collateral description may be required where fixtures are involved. "Brief" is not synonymous with "general" or "imprecise". This conclusion is consistent with the fact that section 36 deals with situations in which specific items are affixed to realty and it is a feature of the land titles system that the public record discloses in detail the real and personal property in which interests are held.

(c) Form 3 must contain information as to the amount "owing with respect to the security interest in the goods" that are or are to become fixtures be disclosed on the public record. A financing statement contains no information as to the amount secured by the security interests to which it relates. Information relating to a security interest in a fixture can be acquired through section 18.

There is no reason to believe that section 66(1) of the PPSA does not apply to the Form 3 notice. The notice is a "document to which this Act applies".

Section 54(2) permits renewal of a notice filed under section 54(1) but only if the original filing has not expired. The limited post-lapse renewal permitted by section 35(5) does not apply to notices filed under section 54. This should create few problems since priority rights under section 36 are not regulated, as they are under section

35, through a "first to register" rule. A lapsed filing of a Form 3 notice makes the security interest in the fixture to which it relates vulnerable to subordination to subsequently acquired interests and to the interest of a prior mortgagee who makes additional advances under his mortgage after the filing has expired.

3. Separate Priority Regimes

Section 54(4) displays the clear separation between the priority system that regulates competing claims to goods as goods and the system (section 36) that regulates the competing claims of a holder of a security interest in the fixtures as personalty and the holder of an interest in the real property of which the fixtures are a part. Registration or the lack thereof as prescribed by one of these systems has no bearing on the priority positions of the security interest involved with respect to the competing interests recognized and regulated by the other system. Subsection (4) provides that a security interest in a fixture may have a perfected, first priority position vis-a-vis other interests in the fixture as personalty even though no notice has been registered in the appropriate land titles office as prescribed by section 54(1). This presents only one side of the picture. It is equally correct to conclude that a security interest in a fixture as personalty may have a first priority status vis-a-vis other interests in the fixture as realty even though it was not perfected pursuant to the PPSA.

4. Discharge

There is no positive obligation under section 54 equivalent to that contained in sections 50(1) and 50(3) to discharge a notice once the obligation to which it relates has been performed. Nor could a person recover damages under section 64 from a registering party for failure to discharge a filed notice. However, section 54(7) gives specified persons the power to have a notice discharged by invoking the procedures for contesting the registration of caveats prescribed by section 158 of The Land Titles Act. The effect of the subsection is to give to persons with an interest in the fixture or an interest in the real property involved rights equivalent to those given under section 50(4) where a registration in the Personal Property Registry is involved.

APPLICATION OF PART V

55.-(1) Unless otherwise provided in this Part, this Part applies only to a security interest that secures payment or performance of an obligation.

(2) Notwithstanding subsection (1), this Part does not apply to a transaction between a pledgor and a pawnbroker.

(3) The rights and remedies mentioned in this Part are cumulative.

(4) Subject to any other Act or rule of law to the contrary, where a security agreement covers both real and personal property, the secured party may proceed under this Part as to the personal property or he may proceed as to both real and personal property, in which case this Part applies as to the personal property only to the extent that is not inconsistent with laws applicable to proceedings against real and personal property in a single action.

(5) A security interest does not merge merely because a secured party has reduced his claim to judgment.

Definitional Cross-References:

"secured party" - s.2(kk)
"security agreement" - s.2(mm)
"security interest" - s.2(nn)

1. Transactions to Which Part Does Not Apply
2. Choice of Remedies

1. Transactions to Which Part Does Not Apply

Part V applies only to true security interests. Where there is a breach of a true lease for more than one year, or a consignment, the remedy lies outside the PPSA. In such a case the lessor or consignor must turn to the underdeveloped case law. Part V will, however, apply if the lease or consignment is in substance a security agreement. The financer under a security lease will be subject to the elaborate system of regulation of default rights and remedies set out in Part V. But characterization of the lease as a security lease is not all bad. The lessor may obtain rights which a lessor under a true lease may not have. He need not fear that an acceleration provision will be struck down as a penalty clause, or that the seizure will terminate the contract and that damages will be restricted to the unpaid rent at the date of determination of the lease.[1]

Section 55(2) provides that Part V does not apply to a transaction between a pledgor and a pawnbroker. Because Saskatchewan has not enacted a Pawnbrokers Act and the English Pawnbrokers Act, 1872 was enacted after the reception date, the rights and remedies will be governed by the common law.

2. Choice of Remedies

Section 55(5) establishes that the secured party may bring an action on the underlying debt before proceeding against the collateral. In doing so there is no danger that the security interest will be taken to have merged in the judgment.[2] The secured party may wish to reduce his claim to judgment if it is clear from the outset that the collateral is insufficient to satisfy the unpaid obligation. Of course, the judgment debt must be reduced by the amount obtained from the disposition of the collateral. The chief advantage of launching an action on the debt before having disposed of the collateral is that the creditor will sooner be able to pursue other unencumbered, non-exempt property of the debtor.

If the secured party does not merely reduce his claim to judgment, but in fact initiates judgment enforcement measures against the collateral, this will not operate as a bar against his claim as a secured party. Section 55(3) provides that the rights and remedies mentioned in Part V are cumulative. The reference to judgments in section 55(5) by implication encompasses judgment enforcement measures as well. Because the remedies are cumulative, the secured party is not required to elect his remedies but may pursue both remedies together. If the remedies are inconsistent, the secured party is not required to elect until there is an irrevocable choice of one over the other.[3] In principle this suggests that a secured party may

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1. *Canadian Acceptance Corp. Ltd.* v. *Regent Park Butcher Shop Ltd.* (1969), 3 D.L.R. (3d) 304 (Man. C.A.).

2. The merger principle is often raised in non-PPSA cases (usually without success). See *Bank of Montreal* v. *Woydon* (1986), 48 Sask. R. 52 (Q.B.).

3. *United Australia, Ltd.* v. *Barclays Bank, Ltd.*, [1940] 4 All E.R. 20, at 37- 39, per Lord Atkin.

reduce his claim to judgment, but later abandon the judgment and instead retain the collateral in satisfaction of the debt under section 61. The judgment recovered is "still but a security for the original cause of action, until it be made productive in satisfaction to the party; and therefore till then it cannot operate to change any other collateral concurrent remedy which the party may have".[4] However, if the collateral or part of the collateral is sold by the sheriff the election is irrevocable.[5] Similarly, a secured creditor may attempt to sell the collateral by private sale, but may abandon this plan once it becomes clear that no suitable offers can be obtained. The advertising and soliciting of offers should not constitute an irrevocable election of remedies so as to prevent the secured party from subsequently proposing to retain the collateral in satisfaction of the debt.

Section 55(4) may also prove to be useful to the secured party. It provides that the secured party may proceed against the personal property and the real property separately, or he may proceed against both real and personal property in one action. In the latter case, the real property procedure will be the dominant rules which will prevail in the event of any inconsistency. It may not always be easy to determine if there is an inconsistency. If in doubt, the secured party may apply to a judge under section 63 for directions concerning the extent to which the procedure set out in Part V is to be followed.

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[4] *Drake v. Mitchell* (1803), 102 E.R. 594, at 596 per Lord Ellenborough C.J., cited in *Bank of Montreal* v. *Woydon, supra*, footnote 2, at 54.

[5] The combined effect of sections 55(3) and (5) should be taken to legislatively reverse *John Deere Limited* v. *Remmen*, [1972] 2 W.W.R. 365 (Sask. C.A.). In that case, the court held that upon obtaining judgment for the unpaid price under a conditional sales contract, the vendor elected to complete the purchase and thereby abandoned the right to repossess.

RIGHTS AND REMEDIES DETERMINED BY SECURITY AGREEMENT AND PART V

56.-(1) A security agreement may provide for the appointment of a receiver or a receiver-manager and, except as provided in this Act, prescribe his rights and duties.

(2) Upon the application of any person entitled to make an application under section 63 and after notice has been given to any person that the judge directs, a court may:

(a) appoint a receiver or receiver-manager;

(b) remove, replace or discharge a receiver or receiver-manager whether appointed by a court or pursuant to a security agreement;

(c) give directions on any matter relating to the duties of a receiver or receiver-manager;

(d) approve the accounts and fix the remuneration of a receiver or receiver- manager;

(e) make any order he thinks fit in the exercise of the jurisdiction of the court over receivers or receiver-managers.

(3) Notwithstanding *The Business Corporations Act* and *The Non-profit Corporations Act*, in sections 17, 56 to 58, subsections 59(1) to (3) and (5) to (15) and sections 60 to 62, "secured party" includes a receiver and a receiver-manager.

(4) Unless a court orders otherwise:

(a) a receiver-manager is only required to comply with sections 17 and 57 to 60 when he disposes of collateral other than in the course of carrying on the business of the debtor; and

(b) sections 61 and 62 do not apply whenever a receiver or receiver-manager has been appointed.

(5) Where the debtor is in default under a security agreement the secured party has, in addition to any other rights and

remedies, the rights and remedies provided in the security agreement except as limited by subsection (8), the rights and remedies provided in this Part and, when in possession, the rights, remedies and duties provided in section 17.

(6) The secured party may enforce the security interest by any method available in or permitted by law and, if the collateral is or includes documents of title, the secured party may proceed either as to the documents of title or as to the goods covered thereby, and any method of enforcement that is available with respect to the documents of title is also available, *mutatis mutandis*, with respect to the goods covered thereby.

(7) Where the debtor is in default under a security agreement, he has, in addition to the rights and remedies provided in the security agreement and any other rights and remedies, the rights and remedies provided in this Part and in section 17.

(8) Except as provided in sections 17, 61 and 62, no provision of section 17 or sections 59 to 63, to the extent that they give rights to the debtor and impose duties upon the secured party, shall be waived or varied.

Definitional Cross-References:

"collateral" - s.2(f)
"court" - s.2(i)
"debtor" - s.2(k)
"documents of title" - s.2(m)
"goods" - s.2(s)
"judge" - s.2(x)
"person" - s.2(cc)
"secured party" - s.2(kk), see also s.56(3)
"security agreement" - s.2(mm)
"security interest" - s.2(nn)

1. Appointment of a Receiver or Receiver-manager by the Secured Party
2. Enforcement of Rights upon Default
3. Pre-seizure Notification of Default
4. Waiver of Debtor's Rights Prohibited

1. Appointment of a Receiver or Receiver-manager by the Secured Party

The law of receiverships is largely uncodified. Sections 89 to 96 of The Business Corporations Act[1] of Saskatchewan, and sections 89 to 96 of the Canada Business Corporations Act[2] provide a skeletal framework. The receivership provisions in the PPSA have two functions. First, some of the provisions of the business corporations legislation are duplicated in order to provide similar statutory regulation of non-corporate receiverships. Second, the provisions provide for more extensive regulations of both corporate and non-corporate receiverships.

Section 56(2) generally parallels section 95 of the Saskatchewan and Canada Business Corporations Acts, though there is no direct equivalent to section 56(2)(e) in the business corporations legislation. Section 63(f) is substantially the same as section 95(d) of the Saskatchewan and Canada Business Corporations Acts.

Section 56(1) states that a security agreement may provide for the appointment of a receiver or a receiver-manager[3] and may, except as provided in the Act, prescribe his rights and duties. This must be read in light of section 56(4), from which four principles emerge:

(a) The court is given the power to modify or waive the requirements of Part V which would otherwise apply to a receiver or receiver-manager (see also section 63). This ensures that a receivership will retain its characteristic flexibility.

(b) A receiver-manager may operate the business in the ordinary course free from most of the requirements of Part V. In addition, the receiver-manager is not required to comply with the requirements of section 17. (This may have been an oversight on the part of the drafters of the Act.)

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[1] R.S.S. 1978, c. B-10.

[2] S.C. 1974-75-76, c.33.

[3] Sections 89 and 90 of both the provincial and federal business corporations statutes provide that a receiver may receive income from the property, pay the liabilities connected with it, and realize the security interest, but generally will not have the power to carry on the business. A receiver who is also appointed receiver-manager may carry on any business of the corporation in order to protect the security interest.

If a receiver-manager sells the collateral out of the ordinary course of business, Part V will apply. Different notification provisions apply in such a case (i.e., sections 59(5) and (7) apply rather than sections 59(4) and (6)).

(c) Section 61, which allows only a secured party to retain the collateral in satisfaction of the debt, does not apply to a receivership.

(d) The redemption and reinstatement provisions of section 62 do not apply to a receivership.

A secured party may include an agency clause in the security agreement which deems the receiver or receiver-manager to be the agent of the debtor. Apparently this is done in order to insulate the secured party from liability for the receiver's debts, or any wrongful act of the receiver,[4] and to facilitate a receiver-manager when carrying on the business of the debtor. Section 56(3) (which defines a "secured party" as including a receiver and a receiver-manager) together with section 56(8) (which generally prohibits waiver of Part V by the secured party) ensures that an agency clause will not insulate the secured party from liability for the wrongful acts of the receiver or receiver-manager. Nor do the courts accept the argument that because the receiver is an agent of the debtor rather than the secured party, the portions of Part V governing disposition of collateral by a receiver do not apply. In this context the agency relationship is viewed as a mere guise.[5] One may well wonder whether the continued use of an agency clause in a security agreement is justified, particularly since it may have unexpected and undesirable consequences.[6]

In *Royal Bank of Canada* v. *White Cross Properties Ltd.*[7] the court reviewed the practice of debenture holders (i.e., the secured party) applying to court after having appointed a receiver-manager pursuant to the security agreement for the appointment by the court of the same receiver-manager. Mr. Justice Matheson held that the court should decline this invitation unless there was some valid reason for intervening, such as serious interference by the debtor with the receiver-manager. The fact that priority competitions may arise in the future is not a sufficient reason for having a court appointment since the receiver-manager has available to him the summary procedure of section 63 of the PPSA whereby the problem could be quickly resolved. In *Price Waterhouse Ltd.* v. *Creighton Holdings Ltd.*[8] the court dealt with the converse situation. Where a receiver-manager is appointed under a security agreement but is subsequently appointed by the court, he is bound by the terms of the court appointment and cannot thereafter purport to exercise the powers granted in the security agreement.

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[4] See D. Milman, "Receivers as Agents" (1981), 44 *Mod. Law Rev.* 658.

[5] *Chrysler Credit Canada Ltd.* v. *Royal Bank* (1984), 3 P.P.S.A.C. 278 (Sask. Q.B.).

[6] *Peat Marwick Ltd.* v. *Consumers' Gas Co.* (1981), 113 D.L.R. (3d) 754 (Ont. C.A.).

[7] (1984), 34 Sask. R. 315 (Q.B.). See also *Bank of Nova Scotia* v. *Sullivan Investments Ltd.* (1982), 21 Sask. R. 14 (Q.B.).

2. Enforcement of Rights upon Default

Sections 56(5) and (7) provide that the rights and remedies set out in Part V come into play when the debtor is in default under a security agreement. The secured party may be granted additional rights and remedies under the security agreement. The term "default" is defined in section 2(1) as "the failure to pay or otherwise perform the obligation secured when due or the occurrence of any event or set of circumstances whereupon, under the terms of the security agreement, the security becomes enforceable". It is up to the secured party to ensure that the events of default are set out in the security agreement. It is also usual for the security agreement to contain an acceleration clause whereby the entire balance becomes due and payable upon any event of default occurring.

Set out below are events of default commonly identified in a security agreement:

THE DEBTOR shall be in default hereunder if:

(a) the debtor fails to pay when due any amount payable on any advances made by the secured party or on any other indebtedness of the debtor the secured party; or

(b) the debtor fails to observe or perform any of the provisions of this or any other related agreement between the debtor and the secured party; or

(c) the debtor fails to pay its debts as they become due, ceases to do business as a going concern or makes an assignment for the benefit of creditors; or

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[8] (1984), 36 Sask. R. 292 (Q.B.).

(d) a petition under the Bankruptcy Act is filed against the debtor; or

(e) the property of the debtor becomes encumbered by a tax lien or is attached or levied or a receiver is appointed; or

(f) the secured party deems itself insecure or decides that the collateral is in jeopardy.

The efficacy of "deemed insecurity clauses is examined in the commentary accompanying section 16. Although a term in a security agreement cannot prevent the debtor from transferring his interest in the collateral, the security agreement may specify such a transfer as an act of default.[9]

Where the collateral is a document of title, the secured party may by virtue of section 56(6) proceed against the documents (e.g., by reselling the document of title) or by proceeding against the underlying goods (e.g., repossessing the goods from the carrier and reselling them).

3. Pre-seizure Notification of Default

Even after an event of default has occurred, the secured party may be prohibited from immediately enforcing his security interest by retaking the collateral. The Supreme Court of Canada in *Ronald Elwyn Lister Limited* v. *Dunlop Canada Limited*[10] held that if a demand is made under a demand debenture, a reasonable time must be afforded within which to pay the full amount of the loan. It seems that the principle applies even where there has occurred an event of default quite apart from the demand for payment in full.[11] Nor does it seem possible to confine the case to demands for payment under demand loans; the case has been applied to a term loan repayable in monthly instalments.[12] Although all the cases applying this doctrine have involved receiverships, it is difficult to see how the principle might be restricted to such situations. If the collateral is in immediate jeopardy, a court may conclude that a few minutes notice, or perhaps even no notice at all, constitutes a reasonable notice. The Ontario Court of Appeal indicated that this should be found only if "there plainly were no resources available to meet the debt or unless it were certain that the debtors would abscond with their assets".[13] Accordingly, the right given to the secured party by virtue of section 58(a) to take possession of the collateral on default must be read in light of this developing line of case authority. A prudent secured party will not test the limits of this principle, but will take the cautious approach by giving written notice to the debtor of its demand for payment and specifying in the notice a reasonable period within which payment is to be made before taking steps to enforce its security interest.

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[9] See section 33.

[10] [1982] 1 S.C.R. 726. *See also Bank of Nova Scotia* v. *Ham* (1986), 29 D.L.R. (4th) 427 (Sask. C.A.), aff'g (1983), 20 Sask. R. 136 (Q.B.).

[11] Ibid. See also *Royal Bank of Canada* v. *Cal Glass Ltd.* (1980), 9 B.L.R. 1 (B.C.S.C.).

[12] *Roynat Ltd.* v. *Northern Meat Packers Ltd.* (1986), 29 D.L.R. (4th) 139 (N.B.C.A.).

4. Waiver of Debtor's Rights Prohibited

The basic system set out in sections 17 and 59 to 63 is for the most part mandatory. This is subject to two exceptions. First, the court is empowered under section 63 to relieve any party from compliance with section 17 or Part V, or to stay the enforcement of such rights. Second, section 56(8) provides that, except to a limited extent, the rights given to the debtor by section 17 and sections 59 to 63 may not be waived or varied. Section 56(8) operates only in favour of the debtor: the secured party may waive or vary rights granted to him by Part V. The limited waiver or variation of the debtor's rights or the secured party's obligations is permitted in the following instances:

(a) A secured party in possession of an instrument, a security or chattel paper may contract out his obligations to preserve rights against other persons. See section 17(1).

(b) The secured party in possession of collateral may contract out of his obligation to keep the collateral identifiable. See section 17(2)(d).

(c) The debtor after the occurrence of an event of default may in writing consent to the immediate disposition of the collateral without notice. See section 59(15)(f).

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[13] *Mister Broadloom Corp. (1968) Ltd.* v. *Bank of Montreal* (1983), 4 D.L.R. (4th) 74, at 80 (Ont. C.A.). Compare *Royal Bank of Canada* v. *Cal Glass Ltd., supra,* footnote 11.

(d) In a sense, the whole of section 61 involves a waiver of the usual system of realization. By choosing not to deliver a notice of objection under section 61(2), the debtor consents to the strict foreclosure of his interest in satisfaction of the debt. Strictly speaking, the mention of section 61 in section 56(8) is superfluous.

(e) The debtor may in writing after the occurrence of an event of default surrender his right to redeem the collateral or his right to reinstate the security agreement. See section 62(2).

COLLECTION RIGHTS OF SECURED PARTY

57.-(1) Where so agreed and in any event upon default under a security agreement, a secured party is entitled:

(a) to notify any debtor on an intangible or chattel paper or any obligor on an instrument to make payment to him whether or not the assignor was theretofore making collections on the collateral; and

(b) to take control of any proceeds to which he is entitled under section 28.

(2) A secured party who by agreement is entitled to charge back the collected collateral or otherwise to full or limited recourse against the debtor and who undertakes to collect from the debtors on intangibles or chattel paper or obligors on instruments may deduct his reasonable expenses of realization from the collections.

Definitional Cross-References:

"chattel paper" - s.2(e)
"collateral" - s.2(f)
"debtor" - s.2(k)
"default" - s.2(1)
"instrument" - s.2(u)
"intangible" - s.2(v)

"proceeds" - s.2(ee)
"secured party" - s.2(kk), see also s.56(3)
"security agreement" - s.2(mm)

A security interest may be taken in obligations owed to the debtor by third parties. For instance, when a retail seller has granted a security interest in all his property, the secured party will have a security interest in accounts (accounts receivable from customers who have purchased on an unsecured basis), chattel paper (in the form of a secured retail instalment sales agreement or conditional sales agreement), and instruments (promissory notes made by customers). Section 57 authorizes the secured party to notify the third party to make payment directly to him. He may also take control of any proceeds of such collateral, but if these proceeds are in the form of tangible personal property, the secured party must conduct the realization in conformity with the other rules of Part V.

Section 57(2) provides that a secured party may deduct his reasonable expenses of collection. This is roughly parallel to section 59(1) which allows the secured party to apply the proceeds of disposition of the collateral to the reasonable expenses of retaking and disposing of the collateral. There would seem to be nothing in the Act that would prevent the secured party from disposing of the intangible, chattel paper or instrument by outright sale under section 59, or even invoking the foreclosure absolute system of section 61 instead of a direct collection from the third party under section 57. However, the more stringent procedural requirements of those sections would have to be observed.

The secured party must take care after notifying the third party under section 57, since the secured party by virtue of section 64(1) is bound to act in a commercially reasonable manner. If the secured party is slow or careless in collecting from the third party, he may find that under section 64(4) he is liable for loss caused to the debtor.

RIGHT TO TAKE POSSESSION ON DEFAULT

58. Subject to sections 36 and 37, upon default under a security agreement:

(a) the secured party has, unless otherwise agreed, the right to take possession of the collateral by any method permitted by law;

(b) the secured party may, if the collateral is equipment and the security interest has been perfected by registration, render that equipment unusable without removal thereof from the debtor's premises, and the secured party is thereupon deemed to have taken possession of the equipment; and

(c) the secured party may dispose of collateral under section 59 on the debtor's premises.

Definitional Cross-References:

"collateral" - s.2(f)
"debtor" - s.2(k)
"default" - s.2(1)
"equipment" - s.2(n)
"secured party" - s.2(kk), see also s.56(3)
"security agreement" - s.2(mm)
"security interest" - s.2(nn)

1. The Secured Party's Right to Repossess
2. Statutory Limitations on the Secured Party's Right to Seize

1. The Secured Party's Right to Repossess

Section 58(a) provides that the secured party upon default has the right to take possession of the collateral by any method permitted by law. This was intended to provide a right of possession whether or not the security agreement contained an express power to do so.[1]

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[1] *Proposals for a Saskatchewan Personal Property Security Act* (July, 1977), Law Reform Commission of Saskatchewan, at 99. The provision was intended to reverse the pre-PPSA position under which, in the absence of an express right to repossess, a conditional seller was treated as repudiating the contract thereby barring any claim to a deficiency. See *Humphrey Motors Limited* v. *Ells*, [1935] S.C.R. 249.

However, in *Mid-Canada Radio Communications Ltd.* v. *Mechanical Services (1979) Ltd.*[2] the court held that the right to possession upon default must be determined by the terms of the security agreement. Thus, if the security agreement is silent, the secured party does not have the right to repossess. This interpretation is difficult to reconcile with the express words of section 58(a). The phrase "unless otherwise agreed" permits the parties to limit the secured party's right to possession created by section 58(a); it does not require that there be a contractual right to possession expressly set out in the security agreement.

The seizure may be by any method permitted by law.[3] The secured party will therefore be governed by the vague direction that it should not involve a "breach of the peace", otherwise it may result in both criminal[4] and civil[5] consequences. For example, if in the event of an unlawful seizure a secured party brings a deficiency action against the debtor, the debtor may counterclaim for damages for trespass in the event of an unlawful seizure. A better course would be for the secured party to apply to the court under section 63 for an order for possession, or obtain possession under replevin proceedings should the debtor resist the seizure. Although the literal wording of section 58(a) may suggest that a security agreement may exempt the secured party from liability for an unlawful seizure, likely such a provision would be struck down as contrary to public policy.

Section 58(b) allows the secured party to take constructive possession of equipment by rendering such collateral unusable. As discussed under section 24, constructive possession under section 58(b) is sufficient for the purposes of Part V, it will not constitute perfection by possession. Where the secured party has attempted to render the equipment unusable but has failed to do so, he will not be deemed to have possession within the meaning of section 58(b) of the Act; nor will he be subject to section 27 of The Limitation of Civil Rights Act,[6] which imposes a severe penalty if the secured party takes possession without complying with that Act.[7]

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[2] [1984] 2 W.W.R. 569, 31 Sask. R. 286 (Q.B.). And see the annotation to the case in (1984), 25 B.L.R. 187.

[3] See generally D.M. Paciocco, "Personal Property Security Act Repossession: The Risk and The Remedy" in *Debtor-Creditor Law, Practice and Doctrine* (M.A. Springman and E. Gertner ed., 1985), Chpt. 8.

[4] *R. v. Doucette* (1960), 25 D.L.R. (2d) 380 (Ont. C.A.).

[5] *Stackaruk* v. *Woodward* (1966), 55 D.L.R. (2d) 577 (Ont. C.A.).

Section 58(c) gives the secured party a licence to dispose of the collateral under section 59 on the debtor's property. This section is useful when dealing with large pieces of equipment where removal and storage expenses would be prohibitive. The equipment may be rendered unusable under section 58(b), then disposed of on the debtor's property under section 58(c).

2. Statutory Limitations on the Secured Party's Right to Seize

In addition to the regulatory scheme in Part V, there are a number of other limitations on the secured party's right to repossess collateral. Section 69(1) expressly provides that in the event of a conflict between a provision of the PPSA and The Limitation of Civil Rights Act,[8] The Exemptions Act[9] or The Distress Act,[10] the latter provision is to prevail.

(a) The Exemptions Act: By virtue of section 3(1) of The Exemptions Act, the exemptions from execution contained in paragraphs 1 to 11 of section 2 extend to a debtor who is faced with seizure of collateral under a security agreement. This protection may be waived by the debtor if the secured party is the Farm Credit Corporation,[11] and certain other classes of secured loans are not subject to the exemption.[12] In addition, the exemptions do not apply where a purchase-money security interest is taken in the collateral, unless the collateral is food, clothing or bedding.[13] Saskatchewan courts have not been reluctant to give these provisions a generous interpretation.[14] A particularly important exemption is that contained in paragraph 4 of section 2. The debtor may claim all animals and equipment that are "reasonably necessary for the proper and efficient conduct of the debtor's agricultural operations" for the next ensuing 12 months. A holder of a non-purchase-money security interest in farm implements may well find that virtually all the equipment is exempt from seizure.[15]

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[6] R.S.S. 1978, c. L-16.

[7] *Bank of Montreal* v. *Gravelle*, [1983] 2 W.W.R. 345 (Sask. (Q.B.).

[8] R.S.S. 1978, c. L-16.

[9] R.S.S. 1978, c. E-14.

[10] R.S.S. 1978, c. D-31.

[11] Section 3(2).

[12] Section 3(3).

[13] Section 5(2).

(b) The Limitation of Civil Rights Act: Sections 19 to 33 of The Limitation of Civil Rights Act provide a special system where certain types of collateral[16] (primarily farm implements) are seized by a secured party. Unlike The Exemptions Act, the limitation on seizure rights extends to secured parties who have a purchase-money security interest in the collateral. The general procedure under these provisions is as follows. Upon default in payment under a security agreement, the secured party must serve on the debtor notice of his intention to seize. No seizure is permitted within 30 days of this notice in order to permit the debtor to apply for a hearing. Thereafter the secured party may seize the collateral, and at the time of seizure he must serve a notice of possession on the debtor. The debtor then has a further 30 days to apply to the court for a hearing. The secured party must not dispose of the collateral within this time. A severe penalty is imposed by section 27 for noncompliance by the secured party: the agreement is terminated, the debtor is released from all liability and in addition is entitled to recover all payments made to the secured party. The notice provisions in these sections are in addition to, and not in substitution of, the statutory requirements of Part V of the PPSA.

Although section 18 is primarily anti-deficiency legislation (see the discussion of section 60 of the PPSA), it may affect the right of secured party to repossess. If the seller falls within section 18, he is limited to his security interest in the goods sold. Thus, if he takes a security interest in all the debtor's property, he is limited by section 18 to seizing and selling only the goods sold. If he seizes any of the debtor's other property he will be guilty of conversion. However, section 18 will not apply if the security interest taken by the seller is in collateral other than the goods sold. Section 40(2) of The Limitation of Civil Rights Act provides that the Act may be waived only by a corporate debtor.

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[14] See *Cook* v. *Avco Financial Services Canada Ltd.*, [1976] 6 W.W.R. 756 (Sask. Dist. Ct.)

[15] See *Roger (G.)* v. *Bank of Montreal* (1986), 47 Sask. R. 200 (Q.B.).

[16] Section 19(b).

(c) The Distress Act: Although paragraph 12 of section 2 of The Exemptions Act exempts a trailer used for living quarters by the debtor, this exemption is not extended by section 3(1) to seizures by secured parties. If, however, the trailer is affixed to the debtor's land, it is paragraph 11 and not paragraph 12 that applies.[17] Although section 36 of the PPSA allows a secured party to remove collateral that has become fixtures, this right by virtue of section 69(1) is subject to The Exemptions Act, and paragraph 11 of section 2 prevents the secured party from exercising this right. If the trailer is not affixed to realty, or if the security agreement creates a purchase money security interest such that the exemptions do not apply, then the secured party may repossess a house trailer provided that he complies with the provisions of The Distress Act. Section 6 provides that a secured party must notify the debtor of his intention to retake possession at least 30 days before the intended seizure. Section 6.1 provides that such a seizure may only be carried out by a sheriff or a person duly authorized by a sheriff.

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[17] *Dolan* v. *Bank of Montreal* (1985), 42 Sask. R. 202 (C.A.), affirming 37 Sask. R. 96 (Q.B.).

RIGHT TO DISPOSE OF COLLATERAL ON DEFAULT

59.-(1) Upon default under a security agreement, the secured party may dispose of any of the collateral in its condition either before or after any repair, processing or preparation for disposition, and the proceeds of the disposition shall be applied consecutively to:

(a) the reasonable expenses of retaking, holding, repairing, processing or preparing for disposition and disposing of the collateral and any other reasonable expenses incurred by the secured party; and

(b) the satisfaction of the obligations secured by the security interest of the party making the disposition.

(2) Collateral may be disposed of:

(a) by public or private sale;

(b) at any commercially reasonable time of day or place;

(c) as a whole or in commercial units or parts;

(d) if the security agreement so provides, by lease or by deferred payment.

(3) The secured party may delay disposition of the collateral in whole or in part for any period of time that is commercially reasonable.

(4) Not less than 20 days prior to disposition of the collateral, the secured party shall serve a notice on:

(a) the debtor or any other person who is known by the secured party to be the owner of the collateral;

(b) any creditor or person with a security interest in the collateral:

(i) whose interest is subordinate to that of the secured party; and

(ii) who has registered a financing statement in the name of the debtor or according to the serial number of the collateral when it is required for registration; and

(c) any other person with an interest in the collateral who has delivered a written notice to the secured party of his interest in the collateral prior to the date that the notice is served on the debtor.

(5) A receiver or receiver-manager appointed by a court or pursuant to a security agreement shall serve notice of his intention to dispose of the collateral on:

(a) the debtor, unless the debtor is a corporation, the directors of which have ceased to have power to act because of the appointment of a receiver- manager;

(b) any other person who is known by the secured party to be the owner of the collateral;

(c) any person mentioned in clause (4)(b); and

(d) any other person with an interest in the collateral who has delivered a written notice to the secured party of his interest in the collateral prior to its disposition.

(6) The notice mentioned in subsection (4) shall contain:

(a) a description of the collateral sufficient to enable it to be identified;

(b) the amount required to satisfy the obligations secured by the security interest;

(c) the sums actually in arrears, exclusive of the operation of any acceleration clause in the security agreement, and a brief description of any other provision of the security agreement for the breach of which the secured party intends to dispose of the collateral;

(d) the amount of the applicable expenses mentioned in clause (1)(a) or, where the amount of such expenses has not been determined, a reasonable estimate;

(e) a statement that upon payment of the amounts due under clauses (b) and (d), any person entitled to receive the notice may redeem the collateral;

(f) a statement that, upon payment of the sums actually in arrears or the curing of any other default, as the case may be, together with the amounts due under clause (1)(a), the debtor may reinstate the security agreement;

(g) a statement that, unless the collateral is redeemed or the security agreement is reinstated, the collateral will be disposed of and the debtor may be liable for any deficiency; and

(h) the date, time and place of any public sale or the date after which any private disposition of the collateral is to be made.

(7) The notice mentioned in subsection (5) shall contain:

(a) a description of the collateral by type or kind; and

(b) the date, time and place of any public sale or the date after which any private disposition of the collateral is to be made.

(8) Where the notice required in subsection (4) is served on any person other than the debtor, it need not contain the information specified in clauses (6)(c), (f) and (g), and, where the debtor is not entitled to reinstate the security agreement, the notice to the debtor need not contain the information specified in clauses (6)(c) and (f).

(9) No statement mentioned in clause (6)(g) shall make reference to any liability on the part of the debtor to pay a deficiency if under any Act or rule of law the secured party does not have the right to collect a deficiency from the debtor.

(10) The notice required in subsection (4) or (5) may be served in accordance with subsection 67(1) or, in the case of service on the person who has registered a financing statement, by registered mail addressed to the post office address of the person to be served as it appears on the security agreement or financing statement.

(11) The secured party may purchase the collateral or any

part thereof only at a public sale and only for a price that bears a reasonable relationship to market value.

(12) When a secured party disposes of collateral by sale to a *bona fide* purchaser for value who takes possession of it, the purchaser acquires the collateral free from the interests of the debtor and from any interest subordinate to that of the secured party, whether or not the requirements of this section have been complied with by the secured party, and all obligations secured by such subordinate interests are deemed to be performed for the purposes of section 50.

(13) Subsection (12) does not apply so as to affect the rights of a person with a security interest deemed to be registered under section 72 who has not been given a written notice under this section.

(14) A person who is liable to a secured party under a guarantee, endorsement, covenant, repurchase agreement or the like and who receives a transfer of collateral from the secured party or is subrogated to his rights has thereafter the rights and duties of the secured party, and such a transfer of collateral is not a disposition of the collateral.

(15) The notice mentioned in subsection (4) is not required where:

(a) the collateral is perishable;

(b) the collateral will decline substantially in value if not disposed of immediately after default;

(c) the cost of care and storage of the collateral is disproportionately large relative to its value;

(d) due to market conditions, a delay in disposing of the collateral would likely reduce the amount recovered from a disposition of it;

(e) for any other reason, a judge, on an *ex parte* application, is satisfied that a notice is not required;

(f) after default, every person entitled to receive a notice of disposition under subsection (4) consents in

writing to the immediate disposition of the collateral.

Definitional Cross-References:

"collateral" - s.2(f)
"court" - s.2(i)
"creditor" - s.2(j)
"debtor" - s.2(k)
"default" - s.2(1)
"financing statement" - s. 2(o)
"judge" - s.2(x)
"obligation secured" - s.2(aa)
"person" - s.2(cc)
"proceeds" - s.2(ee)
"purchase" - s.2(ff)
"purchaser" - s.2(hh)
"secured party" - s.2(kk), see also s.56(3)
"security agreement" - s.2(mm)
"security interest" - s.2(nn)

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1. Method of Disposition
2. The Notice Requirement

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1. Method of Disposition

After taking possession of the collateral, the secured party may dispose of it. The wording of section 59(1) suggests that although the secured party may repair or fix up the collateral, he is not obliged to do so, even though a much higher return would be obtained. One Canadian and a number of United States courts have indicated that the requirement that the secured party act in a commercially reasonable manner may dictate that the secured party take some steps to prepare the collateral for disposition.[1]

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[1] *Donnelly* v. *International Harvester Credit Corporation of Canada Ltd.* (1983), 2 P.P.S.A.C. 290 (Ont. Co. Ct.); *Franklin State Bank* v. *Parker*, 346 A. 2d 632 (N.J. Super. 1975); *Liberty National Bank & Trust Company of Oklahoma City* v. *Acme Tool Division of the Rucker Company*, 540 F. 2d 1375 (10th Cir. 1976).

The secured party may sell by public sale (typically a sale by auction) or by private sale.[2] A secured party may purchase the collateral only if the disposition is by public sale and only if the price bears a reasonable relationship to the market value.[3] The secured party may delay disposition for a commercially reasonable period of time.[4] It may be useful to delay a disposition if there is a temporary down-turn in market conditions. The secured party is generally not compelled to delay disposition in order to receive a somewhat better price. But, in extreme cases, an untimely sale will result in a breach of the duty of the secured party to exercise his rights in a commercially reasonable manner. Section 59 does not set out a formal scheme regulating the advertising of the sale or the method by which the sale is to be conducted. Instead it leaves these decisions to the secured party, but charges him with the duty of acting in a commercially reasonable manner.[5] Thus, if the secured party has sold by public sale but has not advertised sufficiently, he may be liable for the diminished return caused by his failure.

2. The Notice Requirement

The secured creditor is not required to give notice to the debtor of his intention to seize (unless the transaction falls within the provisions of The Limitation of Civil Rights Act[6] or The Distress Act[7]). Following the seizure, the secured party must notify the debtor, as well as certain other parties listed in section 59(4), of the disposition. The notice must conform to the requirements of section 59(6). A typical notice follows:[8]

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[2] Section 59(2).

[3] Section 59(11).

[4] Section 59(3).

[5] See section 64(1).

[6] R.S.S. 1978, c. L-16, s.21. See also the commentary accompanying section 58.

[7] R.S.S. 1978, c. D-31, s.6. See also the commentary accompanying under section 58.

[8] Reproduced with minor modifications from M.W. Milani, "Drafting Security Agreements and Notices" (1984), Materials of The Personal Property Security Act Seminar, Continuing Legal Education, Law Society of Saskatchewan, pp.62 - 64.

SECTION 59

NOTICE OF REPOSSESSION AND INTENTION TO SELL

TO: ______________________________________

TAKE NOTICE THAT THE PERSONAL PROPERTY SET FORTH IN Schedule"A" has been seized by ______________________on the _____day of ___________ , 19 ____, under the provisions of a Security Agreement dated the ________day of, 19 ____ between __________________and the debtor, ______________________________.

Please be advised that:

1. The amount required to satisfy the obligations secured under the Security Agreement is

   $ ____________________ detailed as follows:

(a)	original balance secured	$ ____________
(b)	principal balance now owing as at ________________	$ ____________
(c)	accumulated interest at _______% per annum on past due instalments to date of possession	$ ____________
	TOTAL	$ ____________

2. The actual or estimated expenses of retaking, holding, repairing, processing, and preparing the collateral for disposition are as follows:

(a) Bailiff's fees	$ ________
(b) Storage charges	$ ________
(c) Other expenses	$ ________
(d) Actual or estimated other expenses to be incurred in disposing of the collateral by sale	$ ________
TOTAL	$ ________

3. Upon payment of all the amounts shown in paragraphs 1 and 2 hereof, namely $ ________ in cash, or certified cheque, prior to our disposition of the collateral, you may redeem the collateral.

4. The sum actually in arrears exclusive of the operation of any acceleration clause in the Security Agreement is $ ________.

5. Upon payment of the sum actually in arrears as set out in paragraph 4 hereof, together with all amounts shown in paragraph 2 hereof, you, the debtor, may reinstate the Security Agreement and obtain possession of the property seized. [This clause should be modified if circumstances prescribed by section 62(2) warrant.]

6. Unless the collateral is redeemed or the Security Agreement reinstated the collateral will be disposed of and you, the debtor, may be liable for any deficiency.

7. Disposition of the collateral will be made by:

   (a) Private sale on or after the ____ day of ______, 19 ____;

OR

(b) Public sale which will be held on the ____day
of ___, 19 __ at ______o'clock ___m., _____,
at ________________________, Saskatchewan.

DATED the _______day of ________, 19 ______.

____

Per: _______________

Clause 6 of this notice must be modified if the secured party does not have a right to sue for a deficiency. Section 59(9) prohibits any reference to liability for a deficiency if the secured party does not have the right to collect a deficiency. Under section 59(8), less comprehensive information is required in the notice to be served on a person other than the debtor. Where a receiver or receiver-manager is disposing of collateral, less extensive notification requirements are imposed. Sections 59(5) and (7) provide that the notice need only contain a description of collateral by type or kind, and the date, time and place of any public sale, or the date after which any private disposition of the collateral is to be made.

Under certain circumstances (listed in section 59(15)) notice is not required. For example, notice need not be given if the collateral is perishable. Although section 59(15) only refers to the notice under 59(4) and not to the notice to be given by a receiver or receiver-manager under section 59(5), this is likely a legislative oversight.

It was established in *Canada Permanent Trust Company* v. *Thomas*[9] that non- compliance with the notice provisions does not bar an action for a deficiency. Instead, the debtor's remedy is to claim damages under section 64 for any reasonably foreseeable loss suffered as a result of the non-compliance. Furthermore, section 59(12) provides that a bona fide purchaser for value who takes possession of the collateral disposed of by the secured party will take free from any claim of the debtor from the secured party.

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[9] [1983] 6 W.W.R. 130, 149 D.L.R. (3d) 338 (Sask. Q.B.). See also *Canstar Trucking Ltd.* v. *Bank of Nova Scotia* (1986), 48 Sask. R. 136 (Q.B.). The court refused to apply two Ontario cases in which non-compliance with the statutory notice provisions were held to extinguish the right to sue for the deficiency. See *George O. Hill Supply Ltd.* v. *Little Norway Ski Resorts Ltd.* (1980), 1 P.P.S.A.C. 190 (Ont. Dist. Ct.); *Ford Motor Credit Company of Canada Ltd.* v. *Preuschoff* (1983), 2 P.P.S.A.C. 279 (Ont. Co. Ct.).

An Ontario court[10] considered *Canada Permanent Trust Company* v. *Thomas*, but suggested a modified approach. Where there has been a substantial non-compliance with the notice provisions (e.g., a complete failure to serve the notice) the court may bar an action for a deficiency, but where the non-compliance is of a more technical nature, the deficiency will be reduced only to the extent of the loss or damage actually suffered by the debtor as a result of the non-compliance.

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[10] *National Bank of Canada* v. *Lasalle Excavating of Sudbury Ltd.* (1986), 5 P.P.S.A.C. 279 (Ont. Dist. Ct.). See also *Royal Bank of Canada* v. *J. Secreto Construction Ltd.* (1986), 32 B.L.R. 169 (Ont. Dist. Ct.); *Bank of Nova Scotia* v. *McIvor* (1986), 57 O.R. (2d) 501 (Dist. Ct.).

APPLICATION OF SURPLUS; LIABILITY FOR DEFICIENCY

60.-(1) Where a security agreement secures an indebtedness and the secured party has dealt with the collateral under section 57 or has disposed of it in accordance with section 59 or otherwise, he shall account for and pay over any surplus consecutively to:

(a) any person who has a subordinate security interest in the collateral who registers a financing statement indexed in the name of the debtor or according to the serial number of the collateral, when it is required for registration, prior to the distribution of the proceeds;

(b) any other person who has an interest in the surplus, if that person has delivered a written demand there

for on the secured party prior to distribution of the proceeds; and

(c) the debtor.

(2) The secured party may request a person who has a subordinate security interest or a person who has delivered a written demand to furnish him with proof of that person's interest, and, unless the person furnishes such proof within 10 days after the secured party's demand, the secured party need not pay over any portion of the surplus to him.

(3) Unless otherwise agreed, or unless otherwise provided in any Act, the debtor is liable for any deficiency.

Definitional Cross-References:

"collateral" - s.2(f)
"debtor" - s.2(k)
"financing statement" - s.2(o)
"indebtedness" - s.2(t)
"person" - s.2(cc)
"secured party" - s.2(kk), see also s.56(3)
"security agreement" - s.2(mm)
"security interest" - s.2(nn)

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1. Distribution of Surplus and Liability for Deficiency
2. Statutory Limitations on a Deficiency Action

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1. Distribution of Surplus and Liability for Deficiency

If the secured party's claim (including all reasonable expenses of retaking, repairing and disposing of the collateral) is fully satisfied out of the proceeds of the disposition, the secured party must account for and pay over the surplus first to any subordinate secured party. The secured party should conduct a search of the Registry by debtor name and when possible by serial number since he may be liable for the loss sustained by such party if payment of the surplus is paid directly to the debtor. Any remaining surplus must then be paid to any other person who has an interest in the surplus and who has delivered a written demand to the secured party. Finally, the balance, if any, is paid over to the debtor. The secured party or some other interested person cannot claim a surplus in payment of a separate unsecured debt owed to it by the debtor. Section 60(1) imposes a duty to pay over the surplus unless some other party has some form of proprietary interest in the proceeds.

Section 60(1) should not be taken to alter the priority system. If the "other person who has an interest in the surplus" is entitled to priority over the person who has a subordinate security interest, that priority status prevails.

Section 60(3) provides that the secured party has a statutory right to any deficiency, unless there is an agreement to the contrary, or unless it is prohibited by some other Act. Accordingly, there is, strictly speaking, no need to include a deficiency clause in a security agreement. Prior to the PPSA, a claim for a deficiency could be lost if a conditional sale agreement failed to contain a clause giving the secured party the right to seize and sell the collateral and apply the proceeds against the price.[1] The claim for a deficiency could also be lost for non-compliance with the notice requirements.[2] Under the PPSA, a different system prevails. Section 60(3) provides that no special clause is needed to create a right to a deficiency. Nor will non-compliance with the notice requirements bar the right to a deficiency, though it may allow the debtor (or a subordinate secured party who receives a smaller surplus) to recover damages.[3]

2. Statutory Limitations on a Deficiency Action

Section 18 of The Limitation of Civil Rights Act[4] prevents a seller who has taken a security interest in the goods sold from bringing an action for a deficiency. The secured party cannot waive his security interest and claim for the debt as an unsecured creditor: his only remedy is to repossess and resell the goods. Certain transactions are exempted,[5] and the provision does not apply if the collateral has been totally destroyed.[6] The court is also empowered to permit the secured party to exercise his rights if the debtor has damaged the collateral through neglect, or if for some other reason it is fair and expedient to do so.[7] The Limitation of Civil Rights Act may be waived by a corporate debtor.[8]

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[1] *Humphrey Motors Limited* v. *Ells*, [1935] S.C.R. 249.

[2] *Union Acceptance Corporation Limited* v. *Stefaniuk* (1965), 53 W.W.R. 193 (Sask. Q.B.).

[3] See commentary accompanying section 59. And see section 64(2).

[4] R.S.S. 1978, c. L-16.

[5] Section 18(2).

[6] Section 18(5).

Section 41(3) of The Agricultural Implements Act[9] provides that a dealer may either take a security interest in the agricultural implement sold, or he may take a promissory note in respect of the unpaid price, but he may not take both a security interest and a promissory note. This provision will not bar a deficiency action (i.e., a contractual action for the unpaid price) which exists quite independently of a promissory note.

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[7] Section 18(6).

[8] Section 40(2).

[9] R.S.S. 1978, c. A-10.

RETENTION OF COLLATERAL IN SATISFACTION OF OBLIGATION

61.-(1) After default, the secured party in possession of the collateral may propose to retain the collateral in satisfaction of the obligations secured, and shall serve a notice of the proposal on:

(a) the debtor or any other person who is known by the secured party to be the owner of the collateral;

(b) any creditor or person who has a security interest in the collateral:

(i) whose interest is subordinate to that of the secured party; and

(ii) who has registered a financing statement in the name of the debtor or according to the serial number of the collateral when it is required for registration; and

(c) any other person with an interest in the collateral who has delivered a written notice to the secured party of an interest in the collateral prior to the date that notice is served on the debtor.

(2) If any person who is entitled to notification under subsection (1), and whose interest in the collateral would be adversely affected by the secured creditor's proposal, delivers to the secured party a written objection within 15 days after service of the notice, the secured party shall dispose of the collateral under section 59.

(3) If no objection is made, the secured party in possession is, at the expiration of the 15-day period or periods mentioned in subsection (2), deemed to have irrevocably elected to retain the collateral in full satisfaction of the obligations secured, and thereafter is entitled to hold or dispose of the collateral free from all rights and interests therein of any person entitled to notification under clause (1)(b) who has been served with such notice and any person entitled to notification under clauses (1)(a) and (c) whose interest is subordinate to that of the secured party and who has been served with such notice.

(4) The notice required under subsection (1) may be served in accordance with subsection 67(1) or, in the case of service on a person who has registered a financing statement, by registered mail addressed to the post office address of the person to be served as it appears on the security agreement or financing statement.

(5) The secured party may require any person who has made an objection of his proposal to furnish him with proof of that person's interest in the collateral and, unless the person furnishes proof within 10 days of the secured party's demand, the secured party may proceed as if he had received no objection from such person.

(6) Upon application by a secured party, and after notice to all persons affected, a judge may determine that an objection to the proposal of a secured party is ineffective

on the ground that:

(a) the person made the objection for a purpose other than the protection of his interest in the collateral or the proceeds of disposition of the collateral; or

(b) the market value of the collateral is less than the total amount owing to the secured party and the costs of disposition.

(7) When a secured party in possession disposes of the collateral after expiration of the period mentioned in subsection (3) to a *bona fide* purchaser for value who takes possession of it, the purchaser acquires the collateral free from any interest subordinate to that of the secured party, whether or not the requirements of this section have been complied with by the secured party, and all obligations secured by such subordinate interests are deemed to be performed for the purposes of section 50.

(8) Subsection (7) does not apply so as to affect the rights of a person with a security interest deemed to be registered under section 72 who has not been given a written notice under this section.

Definitional Cross-References:

"collateral" - s. 2(f)
"creditor" - s.2(j)
"debtor" - s.2(k)
"default" - s.2(1)
"financing statement" - s.2(o)
"judge" - s.2(x)
"obligation secured" - s.2(aa)
"person" - s.2(cc)
"secured party" - s.2(kk), see also s.56(3)
"security interest" - s.2(nn)

Section 61 permits the secured party to propose to retain the collateral in full satisfaction of any obligation. The debtor can reject the proposal and force the secured party to dispose of the collateral in the normal fashion by serving a notice of objection on the secured party. The secured party upon receiving the notice of objection must either dispose of the collateral under section 59, or apply to a judge under section 61(6) for a determination that the objection is ineffective on the grounds that the objection was made for an illegitimate purpose (e.g., a nuisance notice) or that the market value of the collateral is less than the total amount owing. The debtor should invoke his rights under this section if he thinks that the realizable value of the collateral exceeds the obligation secured so as to produce a surplus on disposition. The secured party should automatically search the registry by debtor name and serial number (if applicable) and ensure that a subordinate secured party receives notification of the proposal. Subordinate secured parties and other persons holding an interest in the collateral may reject the secured party's proposal. It is likely that an unsecured creditor who has delivered to the sheriff a writ of execution has sufficient interest in the collateral to have the right to reject a proposal. See section 2.2 of The Executions Act.[1]

A strict interpretation of the section suggests that a secured party may only invoke section 61 if he is in possession of the collateral. This would prohibit its invocation where the collateral is an intangible which is incapable of possession. Professor Gilmore found no satisfactory explanation for this requirement of possession in the American equivalent.[2] Another American commentator has argued that "possession" really means "possession where possible".[3]

Section 61(7) provides that a bona fide purchaser for value without notice who takes possession of the collateral takes "free from any interest subordinate to that of the secured party". This should be contrasted with section 59(12) which provides that the purchaser takes "free from *the interest of the debtor* and from any interest subordinate to that of the secured party". This difference in wording suggests that the debtor may claim against a bona fide purchaser where the notification requirements have not been complied with. There does not appear to be any good policy reason for distinguishing between the two situations.

Prior to the enactment of the PPSA there was case authority to the effect that by using seized chattels for his own purposes the secured party is deemed to have accepted the chattels in satisfaction of the debt. Ontario[4] and Manitoba cases[5] have held that the secured party cannot claim the collateral free of the debtor's right to redeem until the notification requirements have been satisfied. The Manitoba case went further and held that the secured party's right to a deficiency is not extinguished until such time. However, this portion of the reasoning may be open to question.

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[1] R.S.S. 1978, c. E-12, as amended S.S. 1979-80, c.24, s.3.

[2] *Security Interests in Personal Property* (1965), Vol. 2, at 1223-24.

[3] B. Clark, *The Law of Secured Transactions under The Uniform Commercial Code* (1980), at 4-84 to 4-83.

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[4] *Tureck v. Hanston Investments Ltd.* (1986), 30 D.L.R. (4th) 690 (Ont. H.C.J.).

[5] *Angelkovski v. Trans-Canada Foods Ltd.*, [1986] 3 W.W.R. 723 (Man. Q.B.).

REDEMPTION OF COLLATERAL; REINSTATEMENT OF SECURITY AGREEMENT

62.-(1) At any time before the secured party has disposed of the collateral or contracted for such disposition under section 58 or before the secured party is deemed to have irrevocably elected to retain the collateral under section 61:

(a) any person entitled to receive a notice of disposition under subsection 59(4) may, unless he has otherwise agreed in writing after default, redeem the collateral by tendering fulfillment of all obligations secured by the collateral;

(b) the debtor may, unless he has otherwise agreed in writing after default, reinstate the security agreement by paying the sums actually in arrears, exclusive of the operation of any acceleration clause, or by curing any other default by reason whereof the secured party intends to dispose of the collateral;

together with a sum equal to the reasonable expenses of retaking, holding, repairing, processing and preparing for disposition and any other reasonable expenses incurred by the secured party.

(2) Unless otherwise agreed, the debtor is not entitled to reinstate a security agreement:

(a) more than twice, if the security agreement or any agreement modifying the security agreement provides for payment in full by the debtor within 12 months after the day value was given by the secured party;

(b) more than twice in each year, if the security agreement or any agreement modifying the security agreement provides for payment by the debtor during a period of time in excess of one year after the day value was given by the secured party.

Definitional Cross-References:

"collateral" - s.2(f)
"debtor" - s.2(k)
"default" - s.2(1)
"obligation secured" - s.2(aa)
"person" - s.2(cc)
"secured party" - s.2(kk), see also s.56(3)
"security agreement" - s.2(mm)
"value" - s.2(qq)

The debtor is given the right to redeem the collateral or reinstate a security agreement at any time before the secured party has disposed of the collateral or contracted with a purchaser for its disposal, or before the expiration of the time period in section 61(3) (provided that the appropriate notice has been given).[1] The debtor may waive the right to redeem or reinstate by giving a post-default agreement in writing that he surrenders such rights. The agreement must be entered into after the default: a term in the security agreement waiving the debtor's rights to redeem or reinstate will not do.[2] In order to redeem the collateral the entire obligation secured must be fulfilled including all reasonable expenses incurred by the secured party. Unless otherwise agreed, the debtor will not generally have the right to partially redeem collateral.

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[1] See *Angelkovski* v. *Trans-Canada Food Ltd.*, [1986] 3 W.W.R. 723 (Man. Q.B.); *Tureck* v. *Hanston Investments Ltd.* (1986), 30 D.L.R. (4th) 690 (Ont. H.C.J.) for the consequences of failing to give such notice.

[2] Section 56(8).

The right to redeem may be exercised by the debtor, but as well may be exercised by "any person entitled to receive a notice under subsection 59(4)". This would allow a subordinate secured party to pay out a senior secured party and redeem the collateral. The reference to section 59(4) leads to the conclusion that where a receiver is appointed, a right to redemption is not automatic. However, a person with an interest in the collateral who wishes to redeem in such a situation can make an application under section 63(e).

Section 61(1)(b) permits a debtor to reinstate a security agreement by paying the arrears or by curing any other default. An acceleration clause is ignored when calculating the arrears. Unlike the right to redeem, the right to reinstate the security agreement may be exercised only by the debtor. Section 62(2) places a limitation on the number of times the debtor may reinstate the security agreement. Unless the parties agree to a greater number of opportunities for redemption, the debtor may reinstate twice each year. It is highly unlikely that a debtor will intentionally engage in a pattern of default and reinstatement since the reasonable expenses of the secured party that must be repaid will quickly become prohibitive.

SUPERVISORY POWER OF COURT

63. Upon application by a debtor, a creditor of a debtor, a secured party, any person who has an interest in collateral which may be affected by an order under this section or a receiver or a receiver-manager, whether appointed by a court or pursuant to a security agreement and after notice has been given to any person that the judge directs, a judge or court may:

(a) make any order, including binding declarations of right and injunctive relief, that is necessary to ensure compliance with this Part or section 17;

(b) give directions to any party regarding the exercise of his rights or discharge of his obligations under this Part or section 17;

(c) relieve any party from compliance with the requirements of this Part or section 17, but only on terms that are just and reasonable for all parties concerned;

(d) stay enforcement of rights provided in this Part or section 17 under any terms and conditions that the judge, in his discretion, considers just and reasonable;

(e) make any order necessary to ensure protection of the interests of any person in the collateral;

(f) make an order requiring a receiver or receiver-manager, or a person by or on behalf of whom he is appointed, to make good any default in connection with the receiver's or receiver-manager's custody, management or disposition of the collateral of the debtor or to relieve such person from any default on such terms as the court thinks fit, and to confirm any act of the receiver or receiver-manager.

Definitional Cross-References:

"collateral" - s.2(f)
"court" - s.2(i)
"creditor" - s.2(j)
"debtor" - s.2(k)
"judge" - s.2(x)
"person" - s.2(cc)
"secured party" - s.2(kk)
"security agreement" - s.2(mm)

Section 63 gives the court a wide supervisory power under which it may determine, clarify and even vary the enforcement rights of the secured party. The section has been invoked on many occasions as a summary means of resolving a priority competition where the facts of the are not in dispute.[1]

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[1] *Canada Imperial Bank of Commerce* v. *Borg-Warner Acceptance Canada Ltd.* (1985), 40 Sask. R. 202 (Q.B.).

The courts have put section 63 to good use. For example in one case in which a priority dispute arose the court granted a stay of a sale pending establishment of priorities upon the disputant's filing of an undertaking that it would make good any loss resulting from the stay should the matter be decided against it.[2] In another case, the court granted an injunction prohibiting the debtor from interfering with the secured party's seizure.[3] A court may also make an order for the delivery of chattels.[4] The effect of section 63 on receiverships is discussed in the commentary accompanying section 56.

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[2] *Chrysler Credit Canada Ltd.* v. *Royal Bank* (1984), 3 P.P.S.A.C. 278 (Sask. Q.B.).

[3] *Martin* v. *Toronto Dominion Bank* (1985), 43 Sask. R. 212 (Q.B.).

[4] *Canadian Imperial Bank of Commerce* v. *Northland Trucks (1978) Ltd.* (1985), 38 Sask. R. 95 (Q.B.).

NON-COMPLIANCE WITH ACT; PRINCIPLES OF COMMON LAW, EQUITY

64.-(1) All rights, duties or obligations arising under a security agreement, under this Act or under any other applicable law, shall be exercised or discharged in good faith and in a commercially reasonable manner.

(2) Where a person fails to discharge any duties or obligations imposed upon him by this Act, any person has a right to recover loss or damage which he suffered and which was reasonably foreseeable as liable to result from such failure.

(3) Except as otherwise provided in this Act, any provision of any agreement which purports to limit the liability of a person for failure to discharge duties imposed upon him by this Act is void.

(4) In assessing damages under this Act, a court may consider as a mitigating factor evidence that the defendant employed reasonable diligence and took all reasonable precautions to discharge the duties and obligations imposed upon him by this Act.

(5) The principles of the common law, equity and the law merchant, except insofar as they are inconsistent with the express provisions of this Act, supplement this Act and continue to apply.

Definitional Cross-References:

"court" - s.2(i)
"person" - s.2(cc)
"security agreement" - s.2(mm)

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1. A General Standard of Conduct
2. The Remedy for Breach of the Statutory Standard
3. The Role of the Common Law and Equity

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1. A General Standard of Conduct

Section 64(1) states a general standard of conduct applicable to the exercise of rights, duties and obligations arising under a security agreement, the Act and under any other legislation applicable to security agreements such as The Limitation of Civil Rights Act and The Exemptions Act. The standard has two aspects: good faith and commercial reasonableness. The mention of a standard of reasonableness or commercial reasonableness in other sections of the Act (e.g., sections 17, 59(2) and 59(3)) should not be read as indicating that the standard of section 64 is not of general application or is different in the context of these sections. The standard is specifically mentioned in these sections only to ensure that it is not overlooked in situations where its application is of central importance. As to the relationship between the standard of good faith and the priority structure of the Act, see the commentary accompanying section 35.

Since the Act is generally quite specific with respect to the statutory rights, duties and obligations of parties to a security agreement or other persons to which the Act applies, section 64 may have its greatest influence in the context of the exercise of those rights provided in security agreements that are not specifically regulated by provisions of the Act.

2. The Remedy for Breach of the Statutory Standard

Sections 64(2)-(4) provide a remedy and prescribe the measure of compensation in cases where the standard set by the Act has not been met. Other sections may provide different or additional remedies in specific situations. See, e.g., sections 11, 18(4), 18(5), 18(8), 50(6), 50(8), 53 and 63.

The measure of damages recoverable under section 64(2) is that generally applicable for breach of contract. However, one need not be a party to a security agreement to recover damages under the section. It expressly applies to "any person" who has suffered loss or damage. Section 64(4) gives to the courts power which they do not have in a common law action for breach of contract. When assessing damages, a court may take into consideration that the breach of the statutory standard by the defendant was unintentional and occurred in spite of the fact that he acted with "reasonable diligence and took all reasonable precautions" to meet the standard. In this respect, liability under section 64(2) is not strict but is subject to an overriding negligence test.

Section 64(3) nullifies any provision in a security agreement designed to limit the liability of any person for failure to discharge his statutory duties under the Act. The section appears to address contractual limitations on liability for non-compliance with the Act and to leave unaffected contractual provisions designed to remove the statutory obligations of the Act. This should not be taken as an indication that the Legislature intended to leave it open for the parties to contract out of these obligations. Rather, it is an indication that the Legislature viewed statutory obligations as not subject to exclusion or modification by contract. To conclude otherwise would result in the public policy of section 64(1) being easily circumvented. For a discussion of the effect of non-compliance with statutory notice provisions on an action for a deficiency, see the commentary accompanying section 59.

3. The Role of the Common Law and Equity

Section 64(5) has little to do with the other subsection of the section and, presumably, was placed in section 64 only as a matter of drafting convenience. The section recognizes that the Act is not a complete, self- contained code of law applicable to personal property security transactions. It draws upon the common law, the rules of equity and the law merchant as a source of rules to fill the gaps in the system and to provide the basic foundation for relationships with which the legislation deals. The most obvious example of incorporation by reference is found in the context of security agreements. Since the Act contains only a few specific provisions relating to security agreements, the law of contract provides the basic infrastructure for regulation of the rights of parties to security agreements. It is for the courts to decide the extent to which the common law, equity and the law merchant have been replaced by the provisions of the Act. However, even the priority system may require supplementation through the invocation of equitable principles such as marshalling.[1]

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[1] United States courts have applied marshalling in the context of Article 9 of the Uniform Commercial Code, the source of The Personal Property Security Act. See *Shedoddy* v. *Beverly Surgical Supply Co.*, 100 Cal. Rptr. 164 (Cal. C.A. 1980).

EXTENSION OF TIME

65. Where in this Act, other than in sections 5 to 7, 13 and 34, Part IV and this Part, any time is prescribed within which or before which any act or thing must be done, a judge, on application, may extend or abridge the time for compliance on any terms and conditions that he considers just and reasonable.

Definitional Cross-References:

"judge" - s.2(x)

The purpose of section 65 is to provide flexibility in situations where the Act prescribes that something be done within a prescribed period of time. There is an ambiguity in the section produced by what must surely be a drafting oversight.

The section applies only to situations in which the Act prescribes that something be done before or within a time period. There are several situations in which rights are acquired or protected if a person takes steps (usually registration of a financing statement) before the expiry of a period of time or before someone else has taken a step or has acquired rights. These are not situations in which the Act prescribes that something be done. All that it does is to provide that certain consequences result if the step is not taken. These consequences usually involved loss of temporary perfection (e.g., section 28(3)) or loss of priority (e.g., section 35(1)). Section 65 should therefore not apply to these situations. This interpretation of the section makes good sense. It is one thing to give to a court power to extend the time for the delivery of a document (e.g., section 11), it is quite another thing to give it power to directly interfere with the operation of the priority system of the Act.

Unfortunately, a narrower interpretation of the section is hampered somewhat by the fact that section 65 expressly excludes specific sections and Parts of the Act which do not prescribe that something be done but which provide that steps be taken if rights are to be preserved. It might be argued that this implies that the court has the power to extend time periods in respect of provisions (other than those expressly excluded in section 65) that merely provide a subordinated priority status or loss of temporary perfection upon a failure to act. The better view is that a court is not given the power to extend the time for taking steps in situations where a time period is set for the taking of such steps but failure to act merely produces a subordinated priority position or results in the loss of temporary perfection. To conclude otherwise would be to invite widespread attempts to secure judicial interference in the priority structure of the Act and to rob it of its central feature: predictability.

EFFECT OF ERRORS OR OMISSIONS

66.-(1) The validity or effectiveness of a document to which this Act applies is not affected by reason of a defect, irregularity, omission or error therein or in the execution or registration thereof unless the defect, irregularity, omission or error is seriously misleading.

(2) Failure to provide a description required by this Act or

the regulations in relation to any type or kind of collateral in a document does not affect the validity or effectiveness of the document as it relates to any other collateral.

Definitional Cross-References:

"collateral" - s.2(f)

Section 66 is designed to provide some relief from the technical requirement of the Act and the regulations where a defect, irregularity, omission or error (hereafter referred to as a deficiency) exists in a document that is not seriously misleading.

Section 66(1) applies to a "document to which this Act applies". The term "document" is not defined in the Act. Consequently, it must be given its ordinary meaning. The Act applies to a number of different types of documents: written security agreements (section 10), notices of judicial proceedings (e.g., section 17(5)(c)(ii)), written demands (e.g., section 18(1)), replies to demands (section 18(4)), notices of intention to take a security interest (e.g., section 34(3)), notices of intention to remove goods (e.g., section 36(9)), written notices of assignments (section 40(1)), financing statements and financing change statements (section 73(g)), search results (section 73(j)), notices served by the registrar (e.g., section 50(4)), a certificate of the registrar (section 54), notices filed in a land titles office (section 54), notices of intention to dispose of collateral (section 59(4)) or to retain collateral (section 61) and written objections (section 61). In order to determine whether or not a deficiency in a particular document is such as to result in it being seriously misleading, it is first necessary to determine the function of the document. Only documents or aspects of documents designed to convey information important to the functioning of the Act fall within the test of the section.

The section is not confined to deficiencies in the contents of documents, it extends to "execution" as well. For a discussion of this aspect of section 66(1), see the commentary accompanying section 10.

Judging from the number of cases which to date have come before Saskatchewan courts since the Act came into force, by far the most important aspect of section 66(1) is the extent to which it affects the validity of financing statements or financing change statements that do not meet the requirements of The Personal Property Regulations. For a discussion of these cases, see commentary accompanying section 44 under the headings:

3. Contents of a Financing Statement - Test of Validity;
4. Features of the Registration Requirements.

SERVICE OF NOTICE

67.-(1) Where under this Act a notice or any other written matter may be or is required to be served, it may be served on:

(a) an individual, by personal service or by registered mail addressed to him at his residence or place of business and, if he has more than one place of business, at any one of his places of business;

(b) a partnership:

(i) by personal service upon:

(A) any one or more of the partners;

(B) any person having, at the time of service, control or management of the partnership business at the principal place of business of the partnership within the province;

(ii) by registered mail addressed to:

(A) the partnership;

(B) any one or more of the partners;

(C) any person having, at the time of service, control or management of the partnership business at the principal place of business of the partnership within the province;

at the post office address of the principal place of business of the partnership within the province;

(c) a body corporate, by delivery to the registered office of the body corporate or by registered mail addressed to the body corporate at its registered office;

(d) an extra-provincial body corporate, by delivery to the attorney for the body corporate appointed under section 268 of *The Business Corporations Act* or section 251 of *The Non-profit Corporations Act* or by registered mail addressed to the body corporate at the address of such attorney.

(2) Service by registered mail is effected when the addressee actually receives a notice or any other written matter, or upon the expiry of four days after the day of registration, whichever is earlier.

(3) For the purposes of this Act, a person knows or has notice when:

(a) in the case of an individual, information comes to his attention under circumstances in which a reasonable person would take cognizance of it;

(b) in the case of a partnership, information has come to the attention of one or more of the partners or of a person having control or management of the partnership business under circumstances in which a reasonable person would take cognizance of it;

(c) in the case of a body corporate, information has come to the attention of:

(i) a managing director or officer of the corporation; or

(ii) a senior employee of the corporation with responsibility for matters to which the information relates;

under circumstances in which a reasonable person would take cognizance of it, or the information in writing has been delivered to the registered office of the body corporate or attorney for an extra-provincial

body corporate appointed under section 268 of *The Business Corporations Act* or section 251 of *The Non-profit Corporations Act*.

(4) Where a notice or any other written matter may be served by registered mail to the post office address as it appears on a registered financing statement or security agreement and:

(a) no financing statement was required to be registered and no sufficient address appears on the security agreement; or

(b) no document is registered and the security interest is deemed to be perfected under subsection 72(3);

the notice or other written matter shall be served in accordance with subsection (1).

Definitional Cross-References:

"financing statement" - s.2(o)
"person" - s. 2(cc)
"security agreement" - s.2(mm)

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1. Service of Notices
2. Effective Notice

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1. Service of Notices

There are two types of situations in which notices are served as provided in the Act. The first is in connection with applications to a court or judge. Some sections only imply that a notice is to be served without specifically so providing (see, e.g., sections 11, 18(5), 18(8), 36(11), 37(11), 50(6) and 65). Other sections specify that notice is to be given (see, e.g., sections 56(2), 61(6) and 63). In all such cases, the requirements as to the contents of the notices and the methods of service are determined by reference to the Queen's Bench Rules of Court and to section 67(1). In cases of conflict, section 67(1) prevails.

The second type of situation in which notices are served pursuant to a provision of the Act is where rights are acquired by the service of a notice (see, e.g., sections 34(2), 36(9), 37(9) and 61(1)), or a notice is served pursuant to a statutory obligation (see, e.g., sections 59(4), 59(5)). In such situations, section 67 provides guidance as to the method of service to be used. Also in this category are all cases in which a written demand (e.g., sections 18(1), 50(3) and 60(1)), or written objection (section 61(2)) may be served. In some situations the sections providing for service permit an optional alternative method other than that specified in section 67 (see sections 18(2), 36(10), 37(10), 50(5)). The alternative method is service by registered mail addressed to the postal address of the person to be served as it is set out on a financing statement or security agreement. In other situations, service can be effected by personal service or by registered mail addressed to the person served at his current actual address; in the case of a partnership, its principal place of business; and in the case of a corporation, its registered office.

Section 67(1) is useful in that it provides guidance as to how partnerships and corporations may be served. The section may cause some difficulty for corporations that carry on business through more than one business premises. The section provides for service at the registered office of the corporation. The onus is thereby placed on officers at the registered office to ensure that the notice is forwarded to the appropriate business premises of the corporation.

Section 67(1) is permissive; it does not state exclusive means of service of notices. Alternative methods may be used so long as actual delivery of the notice to the appropriate recipient can be established.

When service by registered mail is used, it is not necessary that the person to be served actually receive the notice. Under section 67(3), service by registered mail is deemed to occur four days after the day of registration.

2. Effective Notice

There are several sections of the Act under which rights and obligations of persons are affected by the fact that such persons have or do not have knowledge or notice of specified information (see, e.g., sections 5(2)(b), 7(3)(b), 14(2), 20(1)(e), 20(2)(b), 30(1), 30(2), 30(5), 31, 40(1) and 40(4)). The notice or knowledge referred to in these sections is not "constructive notice" which under prior law resulted from the public filing of a security agreement (see section 51).

Where natural persons are involved, the question arises whether a subjective mental element is involved when determining whether or not a person has received notice of information. This question is resolved by section 67(3)(a). An objective "reasonable person" test is to be applied in such cases. The fact that a particular person did not take cognizance of the information which comes to his attention does not mean that he does not in law have knowledge of it if the circumstances under which the information came to his attention are such that a reasonable person in a similar position would take cognizance of the information. On the other hand, if information comes to the attention of a person under circumstances in which a reasonable person would not take note of it, the person in law does not have notice of the information. Accordingly, there is a deeming aspect to section 67(3).

Where partnerships or corporations are involved, an additional issue must be addressed: who are the persons in the business organization who represent the organization for the purposes of receipt of information affecting the organization? Section 67(3) is designed to answer this question. In the case of a partnership, it is a partner or any person having control or management of the partnership business; in the case of a corporation, it is a managing director, officer or senior employee of the corporation with responsibility for matter to which the information relates. Written information is delivered to the registered office of a corporation or the office of the attorney for an extra-provincial corporation, it is deemed communicated to the corporation.

APPEAL

68. An appeal lies from an order, judgment or decision of a judge or the court to the Court of Appeal within the time and in accordance with the practice and procedure established in the rules of the Court of Appeal.

Definitional Cross-References:

"court" - s.2(l)
"judge" - s.2(x)

CONFLICT BETWEEN ACT AND OTHER LEGISLATION

69.-(1) Where there is a conflict between a provision of this Act and a provision of *The Limitation of Civil Rights Act, The Exemptions Act, The Distress Act* or *The Agricultural Implements Act*, the provision of that Act prevails.

(2) Where there is a conflict between a provision of this Act and a provision of any Act for the protection of consumers, the provision of that Act prevails.

(3) Except as otherwise provided in this or any other Act, where there is a conflict between a provision of this Act and a provision of any general or special Act other than those mentioned in subsections (1) and (2), the provision of this Act prevails.

The Limitation of Civil Rights Act,[1] The Exemptions Act,[2] The Distress Act[3] and The Agricultural Implements Act[4] all contain sections that regulate the *inter partes* rights and obligations of parties to a security agreement in a manner different in some respects from that set out in the PPSA. These Acts are of specific application, while the PPSA is of general application. Accordingly, section 69(1) provides that their provisions prevail in cases where conflict occurs.

Cases in which direct conflict occurs should be distinguished from those in which one of the Acts contains a provision that supplements those contained in the PPSA. For example, while the regulatory scheme of sections 19-36 of The Limitation of Civil Rights Act restricts rights given to secured creditors by Part V of the PPSA, it does not supplant all aspects of Part V. Consequently, the notices prescribed by sections 21 and 29 of The Limitation of Civil Rights Act are in addition to the notice of intention to sell prescribed by section 59(4) of the PPSA. Further, there is nothing in section 59 that prevents a secured party from giving a section 59(4) notice to a defaulting debtor at the same time he gives the requisite notices under The Limitation of Civil Rights Act.

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[1] R.S.S. 1978, c.L-16, ss.18-36.

[2] R.S.S. 1978, c. E-14, s.3.

[3] R.S.S. 1978, c. D-31, s.6.

[4] R.S.S. 1978, c. A-10, ss. 41 and 43.1.

Section 69(2) could be given a narrow interpretation on the theory that it was designed to avoid the necessity of amending the PPSA at some future time when new consumer protection legislation is enacted, and that sections 69(1) and 69(3) were intended to address any existing conflicts between the Act and existing consumer protection legislation. The only existing statute that deals expressly with consumer protection in the context of secured credit transactions is The Cost of Credit Disclosure Act.[5] While section 17 of that Act limits the rights that an assignee of an intangible or chattel paper would have in its absence, section 40 of the PPSA has been drafted to accommodate it. See the commentary accompanying section 40.

If, however, section 69(2) is given a broader interpretation - one under which it is seen as applying to any type of legislative provision designed to protect persons who are in a weak bargaining position, including consumers - it will have current relevance. For example, The Unconscionable Transactions Relief Act,[6] gives a court wide powers to limit the enforcement of credit transactions, including secured credit transactions. This legislation is not designed exclusively for the protection of consumers, although it is in the context of consumer credit contracts that it has its most significant effect. There appears to be little justification for giving section 69(2) a narrow interpretation. There is no reason to believe that the Legislature intended to limit the effectiveness of specific legislative measures such as those contained in section 3(d) of The Unconscionable Transactions Relief Act when it enacted legislation that was designed to reformulate the general, underlying law of personal property security transactions.[7]

Section 69(3) states a general rule applicable to all other legislation in cases of direct conflict with the provisions of the Act.

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[5] R.S.S. 1978, c. C-41, s.17.

[6] R.S.S. 1978, c. U-1, s.3(d).

[7] While section 63 of the PPSA gives power to a court to intervene in the enforcement of a security interest, the scope for intervention appears to be much wider under The Unconscionable Transactions Relief Act. Under section 3(d), a court has the power to "set aside either wholly or in part or revise or alter any security given or agreement made in respect of money lent".

REFERENCE TO PREVIOUS LEGISLATION, TERMINOLOGY

70.-(1) A reference, in any general or special Act that relates to a security interest in personal property or fixtures to which this Act applies, to *The Assignment of Book Debts Act*, *The Bills of Sales Act*, *The Conditional Sales Act* or *The Corporation Securities Registration Act*, or any provision thereof, is deemed to be a reference to this Act or to the corresponding provision of this Act, as the case may be.

(2) A reference in any Act to a chattel mortgage, lien note, conditional sales contract, floating charge, pledge, assignment of book debts, or any derivative of these terms, or to any transaction which under this Act is a security agreement, is deemed to be a reference to the corresponding type of security agreement under this Act.

(3) A reference in this Act to:

(a) *The Assignment of Book Debts Act;*

(b) *The Bills of Sale Act;*

(c) *The Conditional Sales Act;* or

(d) *The Corporation Securities Registration Act;*

is deemed to be a reference to that Act as it existed on the day before the coming into force of this Act.

Definitional Cross-References:

"fixtures" - s.2(p)
"security agreement" - s.2(mm)
"security interest" - s.2(nn)

At the time the Act was passed, amendments to several other acts were made so as to ensure that other existing provincial legislation reflected the changes to the basic law of personal property security transactions that was effected through the Act. Section 70(1) was included *ex abundanti cautela* to deal with any references in other statutes to the replaced system.

Section 70(1) provides guidelines to be used when it is necessary to determine the scope and meaning of certain terms used in the context of the replaced system but retained in existing legislation.[1] For the most part, few difficulties should result. However, in some situations it will be difficult to find a "corresponding type of security agreement under this Act". For example, a reference to a "conditional sales contract" in a statute would indicate under prior law a sales contract under which the seller retains title to the goods sold until the purchase price and any credit charge is paid. This term would not include a security interest taken by a seller in the form of a transfer of title back to the seller by the buyer. This would be a chattel mortgage. Under the Act there is no advantage to using the old title retention formulation in a secured instalment sales contract. Consequently, sellers are now more likely to use the much simpler formulation for the creation of a security interest permitted by the Act. If the question arises as to whether or not the legislation that refers to a "conditional sales contract" applies to a security interest given by a buyer to secure the purchase price of the goods in which the security interest has been given, it would be a mistake to conclude that it does not simply because the security agreement in question does not involve retention of title by the seller to the goods sold. In such a case it will be necessary to carefully examine the legislation to determine what legislative policy is embodied in it before arriving at a conclusion. In most situations a legislative reference to a "conditional sales contract" should be treated as a reference to any situation in which the seller of goods has a purchase-money security interest in the goods he sells. It should not matter what formulation has been used to create such a security interest.

A similar sort of problem may arise in the context of a statutory reference to a "floating charge" or "floating debenture". A floating charge or floating debenture is a special form of equitable security device under which it is implied that the charge does not become specific (i.e., crystallizes) until certain events occur. In the meantime, the debtor is given wide latitude to deal with the collateral in the ordinary course of its business free from the interference of the charge holder. Under the Act the concept of a "floating" or non-specific security interest does not exist. See section 12. All security interests are fixed and specific. The debtor's power to deal with the collateral is implied by law (section 30(1)) or results from an express or implied licence contained in the security agreement (section 28(1)(a)). Accordingly, there is no direct "corresponding type" of security agreement under the Act. However, this should not lead to the conclusion that the statutory reference has no significance. Again it will be necessary to examine the legislative policy of the section and on that basis decide whether or not certain types of security agreements created under the Act (e.g., a security agreement providing for an interest in all of the debtor's present and after-acquired property) fall within that policy.

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[1] For example, The Limitation of Actions Act, R.S.S. 1978, c. L-15, ss.39-41 refers to a "conditional sale"; The Limitation of Civil Rights Act, R.S.S. 1978, c.L-16, ss.16-17 refers to a "chattel mortgage".

Section 70(3) relates exclusively to section 72 since it is in only this section that a reference to these statutes occurs.

TRANSITIONAL: VALIDITY AND PRIORITY OF PRIOR SECURITY INTEREST

71.-(1) This Act applies:

(a) to every security agreement made after this Act comes into force;

(b) subject to subsections (2), (3) and (4), to every prior security interest as defined in section 72 which is not validly terminated, completed, consummated or enforced in accordance with the prior law before this section comes into force.

(2) The validity of a prior security interest as defined in section 72 is governed by prior law.

(3) The order of priorities:

(a) between security interests is determined by prior law, if all of the competing security interests arose under security agreements entered into before this Act comes into force; and

(b) between a security interest and the interests of a third party is determined by prior law, if the third

party's interest arose before this Act comes into force and the security interest arose under a security agreement entered into before this Act comes into force.

(4) This Act applies to security interests created under:

(a) renewal, extension, refinancing or consolidation agreements made after this Act comes into force;

(b) revolving credit transactions entered into force and continuing after this Act comes into force.

Definitional Cross-References:

"security agreement" - s.2(mm)
"security interest" - s.2(nn)

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1. Application of the Act
2. Priorities

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1. Application of the Act

Sections 71(1) and 71(4) deal with the important question as to whether or not the Act applies to security interests that came into existence before the Act came into effect and to security interests that came into existence after the Act came into effect pursuant to security agreements executed before that time.

Section 71(1)(b) brings within the operation of the Act all existing "prior security interests" as defined in section 72(1)(a). These are interests created under security agreements that came into existence under prior law. However, the validity of prior security interests is determined by prior law and the priority system of the Act may not apply to priority disputes involving them. Section 71(4) makes it clear that the Act applies to security interests arising after the Act became law but under security agreements that could be considered to have been entered into before the Act came into effect.

2. Priorities

Section 71(3) subjects security interests arising under prior law to the Act's priority regime in all cases in which they are in conflict with security interests arising under security agreements executed after the Act came into effect. If all conflicting security interests came into existence before this date or after it but under security agreements entered into before it, the priority system of prior law applies. The effect of the section is to ensure that the priority system of the Act applies in all situations involving a security interest arising under a security agreement executed after proclamation of the Act. The legitimate expectations of a secured creditor who enters into a security agreement after the Act becomes law are that his rights will be those set out in the Act. Section 71 ensures that these expectations are fulfilled.

TRANSITIONAL: PERFECTION OF PRIOR SECURITY INTEREST

72.-(1) In this section:

(a) "prior security interest" means an interest created, reserved or provided for by a security agreement or other transaction validly created or entered into, before this section comes into force, that is a security interest within the meaning of this Act and to which this Act would have applied if it had been in force at the time the security agreement or other transaction was created or entered into;

(b) "prior registration law" means *The Assignment of Book Debts Act, The Bills of Sales Act, The Conditional Sales Act, The Corporation Securities Registration Act* and section 42 of *The Agricultural Implements Act*.

(2) A prior security interest that, when this section comes into force:

(a) is covered by:

(i) an unexpired filing or registration under a prior registration law is, subject to subclause (ii),

deemed to have been registered and perfected under this Act and, subject to this Act, such filing or registration continues for the unexpired portion of the filing or registration period; and

(ii) an unexpired registration under *The Assignment of Book Debts Act*, or section 19 of *The Bills of Sale Act*, is deemed to have been registered and perfected under this Act, and such registration continues for a period of three years from the day this section comes into force;

and the filing or registration, as the case may be, may be further continued by registration of a renewal statement under this Act where the security interest could be perfected by registration if it were to arise after this Act comes into force; and

(b) is covered by a registration under *The Corporation Securities Registration Act* is deemed to have been registered and perfected under this Act, and such registration continues from the day this section comes into force until discharged under section 50.

(3) A prior security interest validly created, reserved or provided for under any prior law, which gave that interest the status of a perfected security interest without filing or registration under any prior registration law and without the secured party taking possession of the collateral, is perfected within the meaning of this Act as of the date the security interest attached, and, subject to subsection (4), that perfection continues for two years from the day this section comes into force, after which it becomes unperfected unless otherwise perfected under this Act.

(4) The time limit in subsection (3) does not apply to trust indentures.

(5) A prior security interest that, when this section comes into force, could have been but was not:

(a) covered by a filing or registration under a prior registration law;

(b) perfected under prior law through possession of the collateral by the secured party;

may, if permitted by this Act, be perfected by registration or possession in accordance with this Act.

(6) A prior security interest that, under this Act, may be perfected by the secured party's taking possession of the collateral is perfected for the purposes of this Act by such possession, whether such possession occurred before or after this section comes into force and notwithstanding that the prior law did not permit the perfection of the security interest by such possession.

(7) The perfection of a prior security interest that, when this section comes into force, was covered by an unexpired filing or registration under a prior registration law, and for the perfection of which under this Act no registration of a financing statement is required, continues under this Act.

(8) A prior security interest that, when this section comes into force, could have been, but was not, covered by a filing or registration under a prior registration law and that, under this Act, may be perfected without registration of a financing statement and without possession of the collateral by the secured party is perfected under this Act provided that all other conditions for the perfection of the security interest are satisfied.

Definitional Cross-References:

"financing statement" - s.2(o)
"security agreement" - s.2(mm)
"security interest" - s.2(nn)
"trust indenture" - s.2(pp)

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1. Continued Perfection of Prior Registered Security Interests
2. Continued Perfection of Other Security Interests

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1. Continued Perfection of Prior Registered Security Interests

Section 72 provides for the continuation of registrations effected under the registration statutes repealed upon the coming into force of the PPSA. Under section 72(2)(a), a security interest validly registered under prior law continues as a registered interest under the Act until expiry of the period of registration prescribed by prior registration law. Since the registration period under The Bills of Sale Act[1] was three years (with the exception of mortgages registered under section 19 of the Act) and under The Conditional Sales Act[2] was four years, these periods of registration have now expired so that all security interests created by chattel mortgages and conditional sales contracts have either been perfected as PPSA security interests or are unperfected.

Since there were no set periods for the duration of registrations under section 19 of The Bills of Sale Act, The Assignment of Book Debts Act,[3] and The Corporation Securities Registration Act,[4] a different approach was applied to security interests arising under the transactions to which these Acts apply. In the case of registrations under the two former Acts, section 72(2)(b) limits the length of the continued registration to two years. This period has now expired and all security interests registered under these statutes have been perfected as PPSA security interests or are no longer perfected. In the case of registrations under The Corporation Securities Registration Act, no expiry period is set. The result is that such registrations are treated as continuing under the PPSA until they are discharged. Note that such registrations cannot be removed from the registry through use of the lapse procedure of section 50. See sections 50(7) and 50(8).

Continued perfection under the Act after the expiry of the periods set out in section 72(2) can be obtained by registration of a Financing Change Statement A. Failure to register a "renewal statement" before the expiry of the period of registration referred to in sections 72(2)(a) results in the prior security interest becoming unperfected. If, thereafter, registration of the security interest is to be effected, a financing statement must be used and the priority for such security interest dates from the date of the registration.

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1. R.S.S. 1978, c. B-1, repealed S.S. 1979-80, c.13.

2. R.S.S. 1978, c. C-25, repealed S.S. 1979-80, c.16.

3. R.S.S. 1978, c. A-29, repealed S.S. 1979-80, c.12.

4. R.S.S. 1978, c. C-39, repealed S.S. 1979-80, c.18.

In order to take advantage of section 72(2), a security interest to which a registration relates must be valid under prior law.[5] Further, if a security interest is invalid under prior law but valid under the Act, it cannot be perfected as an original PPSA security interest under section 72(5).[6] The only authority for the perfection of prior security interests is section 72. Under section 72(1)(a) a prior security interest must be one that is validly created under prior law.

2. Continued Perfection of Other Security Interests

The scope of the Act, to the extent that it requires registration of security interests and deemed security interests, is broader than the legislation it replaced. Consequently, there were transactions that did not have to be registered under prior law but which, if they had been executed after the Act came into effect, would have resulted in security interests that would have to be perfected under the Act. Assignments of specific accounts, leases for a term of more than one year and commercial consignments are examples of such transactions. Section 72(3) provides a two year period of temporary perfection for security interests arising under these types of transactions. This period has now expired. Section 72(4) has the effect of giving a perpetual period of perfection to interests arising under trust indentures if the interests were valid under prior law and had the status of a perfected security interest without registration or surrender of possession of the collateral to the debenture holder.

Section 72(7) provides for the converse situation: an interest arising under a transaction that had to be registered under prior law and which was so registered but which need not be registered under the Act in order for the continued perfection to be recognized. The perfected status which such security interests had under prior law is continued under the Act without the need for registration or possession of the collateral by the secured party. Security interests temporarily perfected under the Act fall within the scope of these sections. In this context, the sections have no further usefulness since the period of temporary perfection under the Act are short.

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[5] *Re Richardson's Jewellery Ltd.* v. *A & A Jewellers Ltd.* (1983), 34 Sask. R. 263 (Q.B.).

[6] *Borg-Warner Acceptance Canada Ltd.* v. *Federal Business Development Bank*, [1987] 1 W.W.R. 744 (Sask. C.A.).

Under section 72(6) possession of collateral taken prior to the Act coming into force is recognized as an effective method of perfection if it continues after this date even though it was not an effective method through which to perfect a security interest in this type of collateral under prior law. This section was important in the context of interests in chattel paper which under the Act, but not under prior law, can be perfected merely by taking possession of the chattel paper.

REGULATIONS

73. For the purpose of carrying out the provisions of this Act according to their intent, the Lieutenant Governor in Council may make regulations:

(a) prescribing a list of goods the lease of which is not covered by this Act by virtue of subclause (2)(y)(v);

(b) prescribing the amount of any charge to which the secured party is entitled under section 18;

(c) prescribing the duties of the registrar;

(d) prescribing business hours for the offices of the registry or any of them;

(e) respecting the registry, including the transition from any prior registry systems to the system established under this Act;

(f) requiring the payment of fees and prescribing the amount thereof and their manner of payment;

(g) prescribing the form and content of:

(i) financing statements and financing change statements required or permitted to be registered in the registry under this or any other Act, and the manner

of their use and for requiring that such documents used, or any of them, must be those provided by the registrar;

(ii) notices required or permitted to be filed under section 54 in a land titles office and the manner of their use;

(h) prescribing the form of any notices required or allowed to be given under this Act and providing for their use;

(i) prescribing the amounts of compensation payable under section 53;

(j) requiring or permitting the use of a statement to confirm the registration of any financing statement or financing change statement and permitting the amendment of an error in registering on the part of the registrar or the registry and prescribing the limits of such amendments;

(k) prescribing abbreviations, expansions or symbols that may be used in a financing statement, financing change statement, or any other form authorized or required by this Act or in the recording or production of information by the registrar;

(l) governing the right of a secured party to indicate the length of time during which a financing statement or a financing change statement renewing the financing statement shall be effective;

(m) defining any word or expression used in this Act that is required to be defined in the regulations;

(n) prescribing any matter required or authorized by this Act to be prescribed by regulation.

Definitional Cross-References:

"financing change statement" - s.2(o)
"financing statement" - s.2(o)
"goods" - s.2(s)
"prescribed" - s.2(dd)
"registrar" -s.2(ii)
"registry" - s.2(jj)
"secured party" - s.2(kk)

The Personal Property Regulations are set out in Appendix A.

ACT BINDS CROWN

74. The Crown is bound by this Act.

APPENDIX A

REGULATIONS

CHAPTER P-6.1 REG 1

1 These regulations may be cited as *The Personal Property Regulations*. Title

PART I
Interpretation

2(1) In these regulations: Interpretation

(a) "Act" means *The Personal Property Security Act*; "Act"

(b) "artificial body" includes a partnership, corporation, association, organization, estate of a deceased individual or bankrupt, trade union, trust, church or other religious organization, syndicate, joint venture or trustee in bankruptcy, but does not include an individual; "artificial body"

(c) "business debtor" means any artificial body named as debtor; "business debtor"

(d) "individual debtor" means any individual named as debtor; "individual debtor"

(e) "registering party" means either a secured party or a registrant; "registering party"

(f) "Saskatchewan court" means Her Majesty's Court of Queen's Bench for Saskatchewan or the District Court for Saskatchewan; "Saskatchewan court"

(g) "secured party code" means a seven digit number assigned to a secured party by the registrar pursuant to section 36. "secured party code"

(2) In these regulations, with respect to the registration of financing statements and financing change statements authorized to be registered in the registry under the Act, *The Sale of Goods Act, The Factors Act* or *The Garage Keepers Act*: Interpretation

(a) "authorized signature of the secured party" means: "authorized signature of the secured party"

(i) where a secured party is acting on his own behalf, the signature of the secured party and, where the secured party is an artificial body, the typed, printed or stamped name of the individual signing on behalf of the artificial body together with the signature of such individual; or

(ii) where an agent is acting on behalf of a secured party, the signature of the agent where the agent has actual, implied or apparent authority to sign on behalf of the secured party together with the typed, printed or stamped name of such agent and, where the agent of the secured party is an artificial body, the typed, printed or stamped name of such artificial body;

"registrant"

(b) "registrant" means the person who is acting on behalf of a secured party for the purposes of submitting a statement for registration and for receiving verification of the registration, but does not include a clerk or other employee of the secured party receiving verification at the same address as the address shown for the secured party;

"registrant code"

(c) "registrant code" means a seven digit number assigned to a registrant by the registrar pursuant to section 36.

Interpretation

(3) In these regulations, with respect to the registration of financing statements and financing change statements authorized to be registered in the registry under the Act, *The Sale of Goods Act* or *The Factors Act*:

"mobile home"

(a) "mobile home" means any structure, whether ordinarily equipped with wheels or not, that is designed, constructed or manufactured:

(i) to be moved from one place to another by being towed or carried; and

(ii) to be used as:

(A) a dwelling house or premises;

(B) a business office or premises; or

(C) accommodation for a purpose other than one described in paragraph (A) or (B);

"motor vehicle"

(b) "motor vehicle" means motor cars, motor homes, motorcycles, pedal bicycles with motor attachment, snowmobiles, snowplanes, power units, trucks, buses or vans, but does not include motor vehicles running only upon railway company property, fire engines, fire department apparatus, road rollers, street sprinklers, snowploughs and machinery used for the removal of snow and road building and maintenance machinery;

"power unit"

(b.1) "power unit" means a motor vehicle designed and used primarily for pulling a semi-trailer;

"trailer"

(c) "trailer" means a vehicle that is at any time drawn upon a public highway by a motor vehicle and is designed for the conveyance of goods, and a trailer is deemed to be a separate vehicle and not a part of the motor vehicle by which it is drawn.

20 Feb 81 cP-6.1 Reg 1 s2;
20 Jly 84 SR 75/84 s3.

Form to be used

3 Where any statute requires a financing statement or financing change statement in the prescribed form to be registered in the registry, the form to be used is that which is provided by the registrar.

20 Feb 81 cP-6.1 Reg 1 s3.

PART II

Registrations under *The Personal Property Security Act*

Application of Part

4 This Part applies to the registration of financing statements authorized to be registered in the registry under the Act.

20 Feb 81 cP-6.1 Reg 1 s4.

Contents of financing statement

5(1) The registering party shall ensure that a financing statement registered pursuant to this Part contains, in the appropriate area designated on the form:

(a) an "X" to indicate the type of registration as a security agreement under the Act;

(b) a whole number from one to 25 to indicate the number of years, or an "X" to indicate an infinite number of years, in the registration life;

(c) the secured party code or the full name and address of each secured party or, where the interest of the secured party is assigned before registration, of each assignee;

(d) the full name of each debtor in the manner required pursuant to section 35 and, in the case of individual debtors, their dates of birth, if known;

(e) the full address of each debtor;

(f) where a purchase-money security interest is claimed in all or part of the collateral, an "M" to indicate that a purchase-money security interest is claimed;

(g) where proceeds are claimed, a "P" to indicate that proceeds are claimed;

(h) where the security agreement under which the security interest is claimed is a trust indenture, a "T" to indicate that the security agreement is a trust indenture;

(i) where a security interest is claimed in a motor vehicle, trailer, mobile home or airplane and the collateral is consumer goods or equipment, a description by serial number, which description must include:

(i) the last 18 characters of the serial number or, in the case of an airplane, the registration marks assigned to the airplane by the Ministry of Transport, omitting the hyphen which is normally part of such registration marks;

(ii) the make, or where there is no make the manufacturer, and the model;

(iii) the type code as one of airplane, bus, car, mobile home, motorcycle or motor bike, motor home, snowmobile or motor toboggan, trailer, truck, van or other;

and may include:

(iv) the last two digits of the model year;

(v) the colour code as one of grey, white, black, red, green, blue, yellow, orange, purple, brown or other;

(j) where a security interest is claimed in collateral other than that required to be described in accordance with clause (i), a description of the collateral which enables the type or kind of collateral taken under the security agreement to be distinguished from types or kinds of collateral which are not collateral taken under the security agreement, but, in the case of a security interest taken in all of the debtor's present and after-acquired property, a statement indicating that a security interest has been taken in all of the debtor's present and after-acquired property is sufficient; and

(k) the authorized signature of the secured party.

Description where no serial number

(1.1) Where a description by serial number is required pursuant to clause (1)(i) for a trailer, mobile home or motor vehicle, other than a motorcycle, and the trailer, mobile home or motor vehicle does not have a serial number, the serial number of the trailer, mobile home or motor vehicle is:

(a) the serial number assigned by SGI; or

(b) subject to subsection (1.2), where SGI has not assigned a serial number at the time of registration of a financing statement pursuant to this Part, the serial number assigned by the registering party, the debtor or any other person.

Requirements for serial number

(1.2) A person who assigns a serial number pursuant to clause (1.1)(b) shall ensure that it contains at least six numbers and is prominently affixed on the trailer, mobile home or motor vehicle.

Serial number description for a motorcycle

(1.3) Where a description by serial number is required pursuant to clause (1)(i) for a motorcycle, the serial number of the motorcycle is:

(a) the serial number on its frame;

(b) where there is no serial number on its frame, the serial number assigned by SGI for the purposes of the serial number being affixed on the frame of the motorcycle; or

(c) subject to subsection (1.4), where SGI has not assigned a serial number at the time of registration, the serial number assigned by the registering party, the debtor or any other person.

Requirements for serial number

(1.4) A person who assigns a serial number pursuant to clause (1.3)(c) shall ensure that it contains at least six numbers and is prominently affixed on the frame of the motorcycle.

Proceeds description

(2) Where proceeds are required to be described by subsection 28(2) of the Act or a registration is made pursuant to subsection 28(3) of the Act, the description of the proceeds must be provided in the same manner as required in clauses (l)(i) and (j) of this section.

Verification of registration

(3) Where it is desired that a registrant receive verification of the registration, the registering party shall ensure that the financing statement contains the registrant code or the full name and address of the registrant.

20 Feb 81 cP-6.1 Reg 1 s5;
20 Jly 84 SR 75/84 s4.

PART III

Registrations under *The Sale of Goods Act* and *The Factors Act*

6 This Part applies to the registration of financing statements authorized to be registered in the registry under subsection 26(1.1) of *The Sale of Goods Act* and subsection 9(2) of *The Factors Act*. Application of Part

20 Feb 81 cP-6.1 Reg 1 s6.

7 In this Part and, with respect to the registration of financing change statements authorized to be registered in the registry under *The Sale of Goods Act* or *The Factors Act*, in Parts VI to X: Interpretation

(a) "debtor" means a person who, having sold goods, continues or is in possession of the goods or of the documents of title to the goods; "debtor"

(b) "secured party" means a person who, having bought goods, leaves the goods or the documents of title to the goods in the possession of the seller. "secured party"

20 Feb 81 cP-6.1 Reg 1 s7.

8(1) The registering party shall ensure that a financing statement registered pursuant to this Part contains, in the appropriate area designated on the form: Contents of financing statement

(a) an "X" to indicate the type of registration as a registration under subsection 26(1.1) of *The Sale of Goods Act* or subsection 9(2) of *The Factors Act*;

(b) a whole number from one to 25 to indicate the number of years, or an "X" to indicate an infinite number of years, in the registration life;

(c) the secured party code or the full name and address of each secured party or, where the interest of the secured party is assigned before registration, of each assignee;

(d) the full name of each debtor in the manner required pursuant to section 35 and, in the case of individual debtors, their dates of birth, if known;

(e) the full address of each debtor;

(f) where the registration is with respect to a motor vehicle, trailer, mobile home or airplane, a description by serial number, which description must include:

(i) the last 18 characters of the serial number or, in the case of an airplane, the registration marks assigned to the airplane by the Ministry of Transport, omitting the hyphen which is normally part of such registration marks;

(ii) the make, or where there is no make the manufacturer, and the model;

(iii) the type code as one of airplane, bus, car, mobile home, motorcycle or motor bike, motor home, snowmobile or motor toboggan, trailer, truck, van or other;

and may include:

(iv) the last two digits of the model year;

(v) the colour code as one of grey, white, black, red, green, blue, yellow, orange, purple, brown or other;

(g) where the registration is with respect to collateral other than that required to be described in accordance with clause (f), a description of the collateral which enables the type or kind of collateral to be distinguished from types or kinds of collateral which are not the subject matter of the registration; and

(h) the authorized signature of the secured party.

Description where no serial number

(1.1) Where a description by serial number is required pursuant to clause (1)(f) for a trailer, mobile home or motor vehicle, other than a motorcycle, and the trailer, mobile home or motor vehicle does not have a serial number, the serial number of the trailer, mobile home or motor vehicle is:

(a) the serial number assigned by SGI; or

(b) subject to subsection (1.2), where SGI has not assigned a serial number at the time of registration of a financing statement pursuant to this Part, the serial number assigned by the registering party, the debtor or any other person.

Requirements for serial number

(1.2) A person who assigns a serial number pursuant to clause (1.1)(b) shall ensure that it contains at least six numbers and is prominently affixed on the trailer, mobile home or motor vehicle.

Serial number description for a motorcycle

(1.3) Where a description by serial number is required pursuant to clause (1)(f) for a motorcycle, the serial number of the motorcycle is:

(a) the serial number on its frame;

(b) where there is no serial number on its frame, the serial number assigned by SGI for the purposes of the serial number being affixed on the frame of the motorcycle; or

(c) subject to subsection (1.4), where SGI has not assigned a serial number to the motorcycle at the time of registration, the serial number assigned by the registering party, the debtor or any other person.

Requirements for serial number

(1.4) A person who assigns a serial number pursuant to clause (1.3)(c) shall ensure that it contains at least six numbers and is prominently affixed on the frame of the motorcycle.

Verification of registration

(2) Where it is desired that a registrant receive verification of the registration, the registering party shall ensure that the financing statement contains the registrant code or the full name and address of the registrant.

20 Feb 81 cP-6.1 Reg 1 s8;
20 Jly 84 SR 75/84 s5.

PART IV
Filing under *The Garage Keepers Act*

Application of Part

9 This Part applies to the filing of financing statements authorized to be filed in the registry under *The Garage Keepers Act*.

20 Feb 81 cP-6.1 Reg 1 s9.

Interpretation

10 In this Part and, with respect to the filing of financing change statements authorized to be filed in the registry under *The Garage Keepers Act*, in Parts VI to X:

"debtor"

(a) "debtor" means the owner of a motor vehicle with respect to which a lien is claimed under *The Garage Keepers Act*;

(b) "motor vehicle" means a vehicle propelled by any power other than muscular power and includes an airplane, but does not include a motor vehicle that runs only on tracks or rails;

"motor vehicle"

(c) "secured party" means a garage keeper.

"secured party"

20 Feb 81 cP-6.1 Reg 1 s10.

11(1) The registering party shall ensure that a financing statement filed pursuant to this Part contains, in the appropriate area designated on the form:

Contents of financing statement

(a) an "X" to indicate the type of registration as a garage keeper's lien;

(b) the secured party code or the full name and address of the secured party;

(c) the full name of each debtor in the manner required pursuant to section 35 and, in the case of individual debtors, their dates of birth, if known;

(d) the full address of each debtor;

(e) the date the garage keeper gave up possession of the motor vehicle;

(f) the amount of the garage keeper's lien in dollars and cents;

(g) a description of the motor vehicle, including:

(i) the last 18 characters of the serial number of the motor vehicle or, where a garage keeper's lien is claimed with respect to an airplane, the registration marks assigned to the airplane by the Ministry of Transport, omitting the hyphen which is normally part of such registration marks;

(ii) the make, or where there is no make the manufacturer, and the model; and

(iii) the type code as one of airplane, bus, car, motorcycle or motor bike, motor home, snowmobile or motor toboggan, truck, van or other;

and may include:

(iv) the last two digits of the model year;

(v) the colour code as one of grey, white, black, red, green, blue, yellow, orange, purple, brown or other; and

(h) the authorized signature of the secured party.

Description where no serial number

(1.1) Where a description by serial number is required pursuant to clause (1)(g) for a motor vehicle, other than a motorcycle, and the motor vehicle does not have a serial number, the serial number of the motor vehicle is:

(a) the serial number assigned by SGI; or

(b) subject to subsection (1.2), where SGI has not assigned a serial number to the motor vehicle at the time of registration of a financing statement pursuant to this Part, the serial number assigned by the registering party, the debtor or any other person.

Requirements for serial number

(1.2) A person who assigns a serial number pursuant to clause (1.1)(b) shall ensure that it contains at least six numbers and is prominently affixed on the motor vehicle.

Serial number description for a motorcycle

(1.3) Where a description by serial number is required by clause (1)(g) for a motorcycle, the serial number of the motorcycle is:

(a) the serial number on its frame;

(b) where there is no serial number on its frame, the serial number assigned by SGI for the purposes of the serial number being affixed on the frame of the motorcycle; or

(c) subject to subsection (1.4), where SGI has not assigned a serial number at the time of registration, the serial number assigned by the registering party, the debtor or any other person.

Requirements for serial number

(1.4) A person who assigns a serial number pursuant to clause (1.3)(c) shall ensure that it contains at least six numbers and is prominently affixed on the frame of the motorcycle.

Verification of filing (2) Where it is desired that a registrant receive verification of the filing, the registering party shall ensure that the financing statement contains the registrant code or the full name and address of the registrant.

20 Feb 81 cP-6.1 Reg 1 s11;
20 Jly 84 SR 73/84 s6.

PART V

Registrations under *The Executions Act* and *The Creditors' Relief Act*

Application of Part **12** This Part applies to the registration of financing statements authorized to be registered in the registry under *The Executions Act* and *The Creditors' Relief Act*.

20 Feb 81 cP-6.1 Reg 1 s12.

Interpretation **13** In this Part and, with respect to the registration of financing change statements authorized to be registered in the registry under *The Executions Act* and *The Creditors' Relief Act*, in Parts VI to X:

"authorized signature of the secured party" (a) "authorized signature of the secured party" means:

(i) where the execution creditor is acting on his own behalf, the signature of the execution creditor and, where the execution creditor is an artificial body, the typed, printed or stamped name of the person signing on behalf of the artificial body together with the signature of such person; or

(ii) where a solicitor is acting on behalf of the execution creditor, the signature of the solicitor for the execution creditor where the solicitor has actual, implied or apparent authority to sign on behalf of the execution creditor together with the typed, printed or stamped name of such solicitor;

"creditors' relief certificate" (b) "creditors' relief certificate" means a certificate issued under section 19 of *The Creditors' Relief Act*;

"debtor" (c) "debtor" means the execution debtor;

"registrant" (d) "registrant" means the solicitor who acts on behalf of the execution creditor for the purposes of submitting a statement for registration and for receiving verification of the registration;

"registrant code" (e) "registrant code" means a seven digit number assigned to a firm of solicitors by the registrar pursuant to section 36;

(f) "secured party" means the execution creditor. "secured party"

20 Feb 81 cP-6.1 Reg 1 s13; 26 Nov 82 SR 152/82 s5.

14(1) The registering party shall ensure that a financing statement contains, in the appropriate area designated on the form: Contents of financing statement

(a) an "X" to indicate the type of registration as:

(i) a writ of execution or a creditors' relief certificate issued by a Saskatchewan court; or

(ii) a writ of execution issued by the Federal Court of Canada;

(b) the secured party code or the full name and address of the secured party;

(c) the full name of each debtor in the manner required pursuant to section 35 and, in the case of individual debtors, their dates of birth, if known;

(d) the date of:

(i) judgment, where the writ of execution or creditors' relief certificate is issued by a Saskatchewan court, and, with respect to a creditors' relief certificate, the date of judgment is deemed to be the date of issue; or

(ii) issue of the writ of execution, where the writ is issued by the Federal Court of Canada;

(e) the name of the judicial centre to which the writ of execution was originally directed or of the judicial centre where the proceedings were taken to obtain the creditors' relief certificate;

(f) the amount of the writ of execution or creditors' relief certificate in dollars and cents;

(g) in the area of the form provided for general collateral description, an indication of whether the writ of execution attaches goods only or goods and lands or, with respect to a creditors' relief certificate, the words "Creditors' Relief Certificate"; and

(h) the authorized signature of the secured party.

(2) Where it is desired that a registrant receive verification of the registration, the registering party shall ensure that the financing statement contains the registrant code or the full name and address of the registrant. Verification of registration

20 Feb 81 cP-6.1 Reg 1 s14.

PART VI

Registration of Financing Change Statement A

Application of Part

15(1) This Part applies to the registration of a financing change statement A.

Use of financing change statement A

(2) Where a change is to be recorded in respect of:

(a) a renewal;

(b) a total discharge;

(c) a partial discharge of collateral or proceeds;

(d) a debtor release;

(e) an assignment by a secured party;

(f) a transfer by a debtor;

(g) a description of additional collateral or of proceeds;

(h) the registration of a court order; or

(i) any other change to a financing statement described in section 25;

a financing change statement A is to be registered.

20 Feb 81 cP-6.1 Reg 1 s15.

Contents of financing change statement A

16 The registering party shall ensure that a financing change statement A contains, in the appropriate area designated on the form:

(a) an "X" to indicate the type of change as a change described in one of clauses 15(2)(a) to (i);

(b) the registration number, date and time of the financing statement or of the financing change statement to be changed;

(c) the type of registration to be changed, as one of:

(i) a security agreement registered under the Act, which is to be designated as "SA";

(ii) a registration under subsection 26(1.1) of *The Sale of Goods Act* or subsection 9(2) of *The Factors Act*, which is to be designated as "SG";

(iii) a garage keeper's lien, which is to be designated as "GK";

(iv) a writ of execution or a creditors' relief certificate issued by a Saskatchewan court, which is to be designated as "WE";

(v) a writ of execution issued by the Federal Court of Canada, which is to be designated as "FW";

(vi) a bill of sale, which is to be designated as "BS";

(vii) a chattel mortgage, which is to be designated as "CM";

(viii) a notice registered under section 19 of *The Bills of Sale Act*, which is to be designated as "FC";

(ix) a conditional sale, which is to be designated as "CS";

(x) a general assignment of book debts, which is to be designated as "BD"; or

(xi) a corporate security, which is to be designated as "CR";

(d) where a financing statement is to be changed, the first debtor name appearing on that financing statement;

(e) where a financing change statement is to be changed, the first new debtor name appearing on that financing change statement or, where that financing change statement does not contain a new debtor name, the debtor name appearing on that financing change statement in the area of the form designated as "record to be changed" or "record to be amended";

(f) the secured party or registrant code or the full name and address of the secured party or registrant to whom verification of the registration of the financing change statement is to be sent; and

(g) the authorized signature of the secured party.

20 Feb 81 cP-6.1 Reg 1 s16.

17(1) Where a renewal is to be registered with respect to a registration, other than a garage keeper's lien or a writ of execution, the registering party shall ensure that the financing change statement A contains, in the appropriate area designated on the form: Renewal

(a) subject to clause (b), the information required by section 16;

(b) where the registration has been renewed previously, the registration number, date and time of the last financing change statement renewing the registration;

(c) the type of change, which is to be designated as "renewal"; and

(d) where the financing change statement is renewing a registration, a whole number from one to 25 to indicate the number of years, or an "X" to indicate an infinite number of years, in the registration life.

Renewal life (2) The registration life selected in accordance with subsection (1) begins to run from the date and time of the registration of the financing change statement A.

20 Feb 81 cP-6.1 Reg 1 s17;
20 Jly 84 SR 75/84 s7.

Total discharge **18** Where a registration is to be totally discharged, the registering party shall ensure that the financing change statement A contains, in the appropriate area designated on the form:

(a) the information required by section 16; and

(b) the type of change, which is to be designated as "total discharge".

20 Feb 81 cP-6.1 Reg 1 s18.

Partial discharge **19** Where a partial discharge of collateral or proceeds is to be registered, the registering party shall ensure that the financing change statement A contains, in the appropriate area designated on the form:

(a) the information required by section 16;

(b) the type of change, which is to be designated as "partial discharge";

(c) the page number and line letter where the description of the collateral to be discharged appears on the financing statement or on the financing change statement to be changed;

(d) where the collateral that is to be discharged was described by serial number on the lines designated for vehicle description on the financing statement or on the financing change statement to be changed:

(i) the last 18 characters of the serial number or, in the case of an airplane, the registration marks assigned to the airplane by the Ministry of Transport;

(ii) the year, if the year was provided on the financing statement to be changed;

(iii) the make, or where there is no make the manufacturer, and the model;

(iv) the type code as one of airplane, bus, car, mobile home, motorcycle or motor bike, motor home, snowmobile or motor toboggan, trailer, truck, van or other;

exactly as this information appears on the financing statement or on the financing change statement to be changed; and

(e) where the collateral that is to be discharged is described on the lines designated for general collateral description on the financing statement or on the financing change statement to be changed, a description of the collateral which is to be discharged that is sufficient to enable it to be distinguished from collateral which is not discharged.

20 Feb 81 cP-6.1 Reg 1 s19;
26 Nov 82 SR 152/82 s5.

Debtor release

20 Where the release of a debtor is to be registered, the registering party shall ensure that the financing change statement A contains, in the appropriate area designated on the form:

(a) the information required by section 16;

(b) the type of change, which is to be designated as "debtor release";

(c) the page number and line letter where the name of the debtor to be released appears on the financing statement or financing change statement to be changed; and

(d) the name of the debtor to be released exactly as it appears on the financing statement or on the financing change statement to be changed.

20 Feb 81 cP-6.1 Reg 1 s20.

Assignment by secured party

21 Where an assignment by a secured party of his interest is to be registered, the registering party shall ensure that the financing change statement A contains, in the appropriate area designated on the form:

(a) the information required by section 16;

(b) the type of change, which is to be designated as "assignment by secured party";

(c) the page number where the name of the assignor appears on the financing statement or on the financing change statement to be changed;

(d) the secured party code or the full name of the secured party assigning his interest, exactly as this information appears on the financing statement or on the financing change statement to be changed; and

(e) the secured party code or the full name and address of the assignee.

20 Feb 81 cP-6.1 Reg 1 s21;
20 Jly 84 SR 75/84 s8

Transfer by debtor

22 Where a transfer by a debtor is to be registered, the registering party shall ensure that the financing change statement A contains, in the appropriate area designated on the form:

(a) the information required by section 16;

(b) the type of change, which is to be designated as "transfer by debtor";

(c) the page number and line letter where the individual or business debtor name of the debtor who is transferring his interest appears on the financing statement or on the financing change statement to be changed;

(d) the name of the individual or business debtor who is transferring his interest, exactly as this name appears on the financing statement or on the financing change statement to be changed;

(e) the full name of each individual or business debtor to whom the interest is being transferred in the manner required pursuant to section 35; and

(f) the full address of each debtor described in clause (e).

20 Feb 81 cP-6.1 Reg 1 s22.

Addition of collateral or proceeds description

23 Where a description of additional collateral or of proceeds is to be registered, the registering party shall ensure that the financing change statement A contains, in the appropriate area designated on the form:

(a) the information required by section 16;

(b) the type of change, which is to be designated as "addition of collateral or proceeds description"; and

(c) a description of the additional collateral in accordance with the description requirements for the type of registration or a description of the proceeds in the manner provided in section 5.

20 Feb 81 cP-6.1 Reg 1 s23.

Court order

24(1) Where a court order is to be registered, the registering party shall ensure that the financing change statement A contains, in the appropriate area designated on the form:

(a) the information required by section 16;

(b) the type of change, which is to be designated as "court order";

(c) particulars of the court order, including the name of the court, the date and court file number of the order and the judicial centre out of which the order issued; and

(d) the effect of the court order.

Same

(2) Where a financing change statement A recording a court order has the effect of discharging a registration and a copy of the court order accompanies the financing change statement A, the registry staff may accept the financing change statement A without an authorized signature of the secured party.

20 Feb 81 cP-6.1 Reg 1 s24.

Other change

25 Where a change to a financing statement is to be registered, other than:

(a) a change described in sections 17 to 24; or

(b) a change governed by a financing change statement B (amendment);

the registering party shall ensure that the financing change statement A contains, in the appropriate area designated on the form:

(c) the information required by section 16;

(d) the type of change, which is to be designated as "other change";

(e) a description of the type of other change; and

(f) particulars of the change, including its effect.

20 Feb 81 cP-6.1 Reg 1 s25.

Corrections by registry staff

26 Where a financing change statement A described in section 24 or 25 has the effect of:

(a) adding or deleting collateral; or

(b) correcting a debtor name or serial number or other line of a financing statement or financing change statement;

the registry staff may complete additional financing change statements to effect the change required.

20 Feb 81 cP-6.1 Reg 1 s26.

PART VII
Financing Change Statement B (Amendment)

Application of Part

27(1) This Part applies to the registration of a financing change statement B (amendment).

Use of financing change statement B (amendment)

(2) Where a change is to be registered in respect of:

(a) an amendment to information on a financing statement or on a financing change statement that is of a type not provided for in Part VI; or

(b) an error on the part of the registry staff in recording information from a financing statement or a financing change statement;

a financing change statement B (amendment) is to be registered.

20 Feb 81 cP-6.1 Reg 1 s27; 26 Nov 82 SR 152/82 s5.

Contents of financing change statement B (amendment)

28 The registering party shall ensure that the financing change statement B (amendment) contains, in the appropriate area designated on the form:

(a) an "X" to indicate the type of amendment as an amendment described in one of clauses 27(2)(a) or (b);

(b) the information required by section 16, other than that required by clause 16(a); and

(c) except as provided in clause (f), the page number of the page of the financing statement or financing change statement to be amended;

and shall ensure that the financing change statement B (amendment) also contains, in the appropriate area designated on the form:

(d) where the amendment is to substitute a line of information for a line of information on a financing statement or on a financing change statement:

(i) the letter of the line where the information appears on the financing statement or on the financing change statement to be amended; and

(ii) the line of information to be substituted;

(e) where the amendment is to add a line of information for a line on which no information is set out on a financing statement or on a financing change statement:

(i) the letter of the blank line; and

(ii) the line of information to be added;

(f) where the amendment is to add a line of information to a financing statement or to a financing change statement and there is no blank line on the statement on which to add the information:

(i) a page number one digit greater than the highest page number corresponding to the applicable financing statement or financing change statement;

(ii) a line letter that corresponds to an appropriate line letter on the statement; and

(iii) the line of information to be added;

(g) where the amendment is to delete a line of information from a financing statement or from a financing change statement:

(i) the letter of the line to be deleted; and

(ii) the exact information to be deleted as it appears on the financing statement or the financing change statement to be amended.

20 Feb 81 cP-6.1 Reg 1 s28; 26 Nov 82 SR 152/82 s5.

29(1) Where a change is to be registered to indicate that the type of registration on a financing statement or on a financing change statement is incorrect, the registering party shall ensure that the financing change statement B (amendment) contains, in the appropriate area designated on the form, the correct type of registration as provided in clause 16(c). Change in type of registration

(2) Where a change is to be registered to correct an error in a name or address, the correct full name and address must both appear. Change in name or address

20 Feb 81 cP-6.1 Reg 1 s29.

PART VIII
Use of Verification Statements

30 This Part provides for the sending of a verification statement and for the use of a verification financing change statement. Application of Part

20 Feb 81 cP-6.1 Reg 1 s30.

Verification statement

31(1) Upon processing by the registry of a registration of a financing statement or of a financing change statement, a verification statement which confirms the information recorded in the registry may be sent, by ordinary mail, to the secured party or, where a registrant code or the full name and address of a registrant is given, to the registrant.

Discharge verification statement

(2) Where a financing change statement totally discharges a registration, a discharge verification statement may be sent to both the secured party and the registrant whose code or full name and address appear on the financing statement or on the financing change statement.

20 Feb 81 cP-6.1 Reg 1 s31.

Use of verification financing change statement

32(1) The verification financing change statement which is attached to the verification statement mentioned in subsection 31(1) allows the secured party or registrant:

(a) to correct an error made by the registry staff in recording the information provided on the financing statement or on the financing change statement in the registry;

(b) subject to subsection (2), to amend information previously submitted by the secured party or registrant;

(c) to totally discharge the financing statement and all accompanying financing change statements.

Limitation on use

(2) No verification financing change statement may be registered to effect a change to which Part VI applies, other than a change described in clause (1)(c).

20 Feb 81 cP-6.1 Reg 1 s32.

Correction of registry errors and amending information

33 Where the correction of an error made by the registry staff in recording information is to be registered or where an amendment to information previously submitted by the registrant or secured party is to be registered, the registering party shall ensure that the verification financing change statement contains:

(a) in the appropriate area designated on the form, an "X" to indicate the type of change as a change described in one of clauses 32(1)(a) and (b);

(b) the incorrect information, by drawing a line through the information;

(c) the correct information; and

(d) the authorized signature of the secured party.

20 Feb 81 cP-6.1 Reg 1 s33.

Total discharge

34 Where the total discharge of a financing statement is to be registered, the registering party shall ensure that the verification financing change statement contains, in the appropriate area designated on the form:

(a) an "X" to indicate "total discharge"; and

(b) the authorized signature of the secured party.

20 Feb 81 cP-6.1 Reg 1 s34.

PART IX
Particulars of Content of Form

Individual debtor name

35(1) Where an individual is a debtor, the name to be set out in the financing statement or financing change statement in the area designated for "individual debtor" is the surname followed by the first given name and the second given name or initial, if any.

Artificial body debtor name

(2) Where an artificial body is a debtor, the name to be set out in the financing statement or financing change statement in the area designated for "business debtor" is, where the artificial body is:

(a) a partnership, and the partnership is:

(i) registered under *The Business Names Registration Act*, the registered name of the partnership; or

(ii) not registered under *The Business Names Registration Act*:

(A) the name of the partnership; and

(B) the name of at least one of the partners, and where the partner is:

(I) an individual, the information required under subsection (1); or

(II) an artificial body, the information required under this subsection;

(b) a body corporate, the name under which the body corporate is incorporated;

(c) an unincorporated association, organization, syndicate, joint venture or church or other religious organization, and is:

(i) registered under *The Business Names Registration Act*, the registered name; or

(ii) not registered under *The Business Names Registration Act*:

(A) the name as set out in the constitution, charter or other document creating the association, organization, syndicate, joint venture or church or other religious organization; and

(B) the name of each person representing the debtor in the transaction giving rise to the registration and, where such person is:

(I) an individual, the information required under subsection (1); or

(II) an artificial body, the information required under this subsection;

(d) an estate of a deceased individual, the first given name, followed by the second given name or initial, if any, followed by the surname of the deceased, followed by the word "estate";

(e) a trade union:

(i) the name of the trade union; and

(ii) the information required under subsection (1) for each individual representing the trade union in the transaction giving rise to the registration;

(f) a trust and the document creating the trust:

(i) designates a name for the trust, that name followed by the word "trust";

(ii) does not designate a name for the trust, the name of one of the trustees and, where the trustee is:

(A) an individual, the information required under subsection (1); or

(B) an artificial body, the information required under this subsection;

(g) an estate of a bankrupt and the bankrupt is:

(i) an individual, the first given name followed by the second given name or initial, if any, followed by the surname of the individual, followed by the word "bankrupt"; or

(ii) an artificial body, the name of the artificial body followed by the word "bankrupt";

(h) any artificial body, other than one described in clauses (a) to (g):

(i) the name of the artificial body; and

(ii) the name of each person representing the artificial body in the transaction giving rise to the registration and, where such person is:

(A) an individual, the information required under subsection (1); or

(B) an artificial body, the information required under this subsection.

English and French forms of name

(2.1) Notwithstanding clause (2)(b), when a corporation has set out its name in its articles in an English form and a French form or in a combined English and French form pursuant to subsection 10(4) of *The Business Corporations Act* or subsection 10(3) of *The Non-profit Corporations Act*, the name to be set out in a financing statement or financing change statement is to be in an English form on one line designated for the business debtor and in a French form on another line so designated.

Location of name in financing statement

(3) Where the name of a person is required to be set out in a financing statement or in a financing change statement under subsections (1) and (2), the name is to be set out for:

(a) an individual, on the line designated for "individual debtor";

(b) an artificial body, on the line designated for "business debtor".

Other business name

(4) Where a person named as a debtor carries on business under a name or style other than his own name, this name may also be separately set out on a financing statement or on a financing change statement in the area of the form designated for business debtor name in accordance with subsection (2).

Use of abbreviations

(5) Where a name is set out on any form required for registration in the area designated for business debtor, the abbreviations set out in Column 2 of Appendix III may be used in lieu of the information set out opposite those abbreviations in Column 1 of Appendix III.

Use of punctuation in individual debtor name

(6) No punctuation marks, except the hyphen and apostrophe, are to be used on any form to be registered in the area designated for "individual debtor".

Use of punctuation in business debtor name

(7) The comma and period must not be used in the area of any form to be registered which sets out business debtor name, and other symbols set out in Appendix II may only be used where necessary to comply with subsection (2).

20 Feb 81 cP-6.1 Reg 1 s35;
26 Nov 82 SR 152/82 s5;
20 Jly 84 SR 75/84 s9.

Secured party or registrant code

36 The registrar may assign a code to a secured party or a registrant and the code may be set out in a financing statement or in a financing change statement in lieu of the full name and address of the registrant or secured party.

20 Feb 81 cP-6.1 Reg 1 s36.

Dates

37 Where these regulations require a date to be shown, the financing statement or the financing change statement must set out, in the following order:

(a) the day of the month in numerals;

(b) the first three letters of the name of the month; and

(c) the last two digits of the number of the year.

20 Feb 81 cP-6.1 Reg 1 s37.

Additional pages

38(1) Where additional space is required, additional financing statements or financing change statements may be used, in which case each financing statement or financing change statement is to be numbered and the number of pages in total is to be set out on each financing statement or financing change statement in the area provided for that purpose.

Additional lines

(2) Where, after exhausting all applicable line space in a line designated for secured party name or business debtor name on any given page, additional space is required, the line may be continued in another line on the same page designated for that purpose, and, where that line is to be used, the letter of the line to be continued and the information to be continued must be set out, but, in the case of a business debtor name, the utilization of the additional space does not increase the searchable capacity of the name.

Reference numbers

(3) A financing statement or financing change statement may contain a reference number supplied by the registering party, which reference number is provided only for the use of the registering party.

20 Feb 81 cP-6.1 Reg 1 s38.

PART X
Manner of Recording

Manner of recording

39 The information required or permitted by these regulations to be set out on a financing statement or on a financing change statement must be set out in a manner suitable for microfilming and, without limiting the generality of the foregoing:

(a) the information must be typewritten or machine printed in black ink with clear, neat and legible characters without erasure, interlineation or alteration;

(b) alphabetical characters must be in upper case only; and

(c) subject to the other provisions of these regulations, the information must be without punctuation marks or symbols.

20 Feb 81 cP-6.1 Reg 1 s39.

APPENDIX A

Punctuation

40(1) Subject to subsections 35(6) and (7), the punctuation marks or symbols set out in Column 2 of Appendix II may be used in any form to be used for registration.

Abbreviations

(2) The abbreviations or expansions set out in Column 2 of Appendices III and IV may be used on any form mentioned in these regulations for:

(a) secured party name and address;

(b) debtor address; and

(c) collateral description, including vehicle description;

in lieu of the information set out opposite to those abbreviations or expansions in Column 1 of Appendices III and IV.

Abbreviations used by registry staff

(3) In entering information into the computerized system of the registry, any word set out in Column 1 of Appendix III may be entered by the registry staff in the abbreviated form set out opposite that word in Column 2 of Appendix III.

20 Feb 81 cP-6.1 Reg 1 s40.

Maximum number of characters

40.1 No person who completes a financing statement or financing change statement shall use, in the categories or lines of a financing statement or financing change statement mentioned in Column 1 of Appendix V, a number of characters exceeding the number of characters mentioned in Column 2 of Appendix V.

20 Jly 84 SR 75/84 s10.

PART XI

Office Hours, Fees and Practice

Office hours

41(1) The registry will be open, between the hours of 10:00 a.m. and 4:00 p.m., on every day on which the office of the Local Registrar of Her Majesty's Court of Queen's Bench for Saskatchewan for the Judicial Centre of Regina is open.

Same

(2) The office hours of deputy registrars mentioned in subsection 43(2) of the Act are the same as those provided in subsection (1).

20 Feb 81 cP-6.1 Reg 1 s41.

Fees

42(1) The fees provided in Appendix I are required to be paid for the services referred to in that Appendix.

Advance payment required

(2) The registrar is entitled to demand and receive all fees in advance of the rendering of the service.

No charges to Crown

(3) No person shall charge a fee for any service provided for Her Majesty in right of Saskatchewan except a service provided for a Crown Corporation or the Saskatchewan Housing Corporation.

20 Feb 81 cP-6.1 Reg 1 s42;
20 Jly 84 SR 75/84 s11.

Transitional

42.1 A financing change statement tendered for registration:

(a) with respect to:

(i) an assignment of book debts;

(ii) a bill of sale;

(iii) a chattel mortgage;

(iv) a notice registered pursuant to section 19 of *The Bills of Sale Act*;

(v) a conditional sale; or

(vi) a writ of execution;

which was registered in the Central Registration Office prior to January 1, 1979; or

(b) with respect to a corporate security which was registered with the Provincial Secretary prior to the coming into force of these regulations;

may have the following information added to it by the registry staff:

(c) page numbers and line letters corresponding to information to be amended or added;

(d) the first debtor name to meet the requirements of clause 16(d);

(e) a conversion prefix added to the registration number.

20 Feb 81 cP-6.1 Reg 1 s42;
20 Jly 84 SR 75/84 s11.

Notice to discharge

43(1) Where a person having an interest in collateral requires the registrar to serve a notice to discharge on a secured party pursuant to subsection 50(4) of the Act, he shall register with the registrar a requisition in Form 1 bearing the signature of the person requisitioning the notice to discharge.

Service

(2) Where the registrar accepts a requisition mentioned in subsection (1), he shall serve a notice on the secured party in Form 2.

20 Feb 81 cP-6.1 Reg 1 s43.

PART XII
Fixtures

Application of Part

44 This Part applies to the filing of notices with respect to fixtures in the land titles offices pursuant to section 54 of the Act.

20 Feb 81 cP-6.1 Reg 1 s44.

Filing notice re fixtures

45(1) Where a secured party claims a security interest in goods which are or may become fixtures, he shall cause to be filed in the land titles office for the land registration district within which the land is situated a notice in Form 3, setting out:

(a) the name and address of the secured party;

(b) the full name and address of the debtor;

(c) a description of the goods by which they may readily and easily be known and distinguished;

(d) the amount owing with respect to which the security interest is granted or taken in the goods;

(e) the registration life of the notice in multiples of one year or an infinite number of years;

(f) a description of the land to which the goods are or are to be affixed, sufficient for the purpose of identification in the land titles office; and

(g) the address within Saskatchewan at which notices may be served;

and any such notice is to be signed by the secured party or his agent and witnessed.

Filing changes re notice

(2) Where a secured party who has filed a notice pursuant to subsection (1), renews, assigns, discharges, subordinates his interest to another or partially discharges his interest, he shall cause to be filed in the land titles office where the notice under subsection (1) was filed, a notice in Form 4, setting out:

(a) the name and address of the secured party;

(b) the description of the land given in accordance with clause (1)(f);

(c) the date of the notice filed pursuant to subsection (1), the date of its registration and the instrument number assigned to it;

(d) in the case of a notice of renewal, the registration life in multiples of one year or an infinite number of years;

(e) in the case of a notice of subordination:

(i) the full name and address of the person to whom the interest of the secured party is being subordinated; and

(ii) the nature and instrument number of the interest to which the interest of the secured party is being subordinated;

(f) in the case of a notice of amendment, the particulars of the amendment;

(g) in the case of a notice of discharge, a statement to the effect that the notice mentioned in subsection (1) is wholly discharged;

(h) in the case of a partial discharge, a description of the land to which the goods are affixed; and

(i) in the case of an assignment:

(i) a statement to the effect that the notice has been assigned;

(ii) the name and address of the person to whom the interest is being assigned; and

(iii) an address for the assignee at which notices may be served in Saskatchewan;

and any notice filed pursuant to this subsection is to be signed by the secured party or his agent and witnessed.

Affidavits

(3) Subject to subsection (4), an affidavit of execution in Form 5 and, in any case where an agent is acting on behalf of the secured party, an affidavit verifying the notice in Form 6 is to be annexed to any notice filed pursuant to this section.

Execution by corporation

(4) Where a notice mentioned in subsection (1) or (2) is executed by a corporation under its corporate seal, no affidavit of execution is required.

20 Feb 81 cP-6.1 Reg 1 s45.

PART XIII
Miscellaneous

Fees under s 18 of Act

46 A secured party is entitled to demand a fee of $5 for responding to a demand in writing under section 18 of the Act and, where a copy of the security agreement is demanded, a reasonable fee not greater than 50¢ per page for each page of the security agreement and any amendment to the security agreement.

20 Feb 81 cP-6.1 Reg 1 s46.

Definition re subsection 30(3) of Act

47 For the purposes of subsection 30(3) of the Act, "motor vehicle" has the meaning ascribed to it in clause 2(3)(b) of these regulations.

20 Feb 81 cP-6.1 Reg 1 s47.

48(1) The limit on the amount payable to any single claimant pursuant to subsection 53(1) of the Act is $300,000. Liability limit

(2) The limit on the total of all claims for compensation payable under subsections 53(3) and (4) of the Act is $2,400,000. Same

20 Feb 81 cP-6.1 Reg 1 s48.

49 A reference in these regulations to: References

(a) *The Assignment of Book Debts Act*;

(b) *The Bills of Sale Act*;

(c) *The Conditional Sales Act*; or

(d) *The Corporation Securities Registration Act*;

is deemed to be a reference to that Act as it existed on the day before the coming into force of *The Personal Property Security Act*.

20 Feb 81 cP-6.1 Reg 1 s49.

50(1) In this section, "telephone switchboard" means electronic, automatic or manually operated local telephone office equipment that serves extensions in a business complex and provides access to the public switched network. Application of Act

(2) *The Personal Property Security Act* does not apply to the leasing of:

(a) telephones;

(b) telephone switchboards;

(c) telephone switchboard consoles;

(d) telephone jacks;

(e) telephone plugs; or

(f) telephone wiring.

20 Jly 84 SR 75/84 s12.

APPENDIX A

APPENDIX I

Fees

REGISTRATIONS

1 To register a *FINANCING STATEMENT* covering:	
(a) *Personal Property Security Act* Security Agreement or registration under *The Sale of Goods Act* or *The Factors Act*	$ 3 per year for optional registration life from 1 to 25 years, or $100 for infinity registration life
(b) Garage Keeper's Lien	5
(c) Writ of Execution issued by a Saskatchewan Court or a Creditors' Relief Certificate	10
(d) Writ of Execution issued by the Federal Court of Canada	5
2 To register a *FINANCING CHANGE STATEMENT A* covering:	
(a) Renewal	$ 3 per year for optional renewal registration life from 1 to 25 years, or $100 for infinity renewal registration life
(b) Total Discharge	NO CHARGE
(c) Partial Discharge	5
(d) Debtor Release	5
(e) Assignment by Secured Party	5
(f) Transfer by Debtor	5
(g) Addition of Collateral or Addition of Proceeds Description	5
(h) Court Order	5
(i) Other Change	5
3 To register a *FINANCING CHANGE STATEMENT B* covering:	
(a) Secured Party or Registrant amendment	$ 5
(b) Correction of Personal Property Registry error	NO CHARGE
4 To register a *VERIFICATION FINANCING CHANGE STATEMENT* covering:	
(a) Correction of Personal Property Registry error	NO CHARGE
(b) Secured Party or Registrant amendment	$ 5
(c) Total Discharge	NO CHARGE
5 To register ANY OTHER DOCUMENT REQUIRED TO BE REGISTERED IN THE REGISTRY AND NOT OTHERWISE PROVIDED FOR	$ 5

SEARCH REQUESTS

1 To requisition a search with verbal response	$ 5
2 To requisition a search with printed response	$10

MISCELLANEOUS

1 To obtain a photocopy of a document, Financing Statement or Financing Change Statement	50¢ per page
2 To certify a copy obtained in item 1	$ 1
3 To request a Registrar's Notice of Discharge in accordance with subsection 50(4) of *The Personal Property Security Act*	$ 5
4 To obtain a Registration Guide	NO CHARGE
5 To obtain a Inquiry Guide	NO CHARGE

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APPENDIX II

Punctuation

COLUMN 1	*COLUMN 2*
Ampersand	&
Apostrophe	'
Comma	,
Dollar sign	$
Hyphen	-
Parentheses	( )
Percent sign	%
Period	.
Plus sign	+
Quotation marks	"
Virgule	/

20 Feb 81 cP-6.1 Reg 1.

APPENDIX III

Abbreviations

COLUMN 1	*COLUMN 2*
CANADA	CAN
COMPANY	CO
CORPORATION	CORP
DIVISION OF	DIV OF
INCORPORATED	INC
INCORPORÉE	INC
LIMITED	LTD
LIMITÉE	LTÉE

20 Feb 81 cP-6.1 Reg 1.

APPENDIX IV

Abbreviations

COLUMN 1	*COLUMN 2*
ALBERTA	ALTA
AMERICAN MOTORS	AM, AM MOTORS
APARTMENT	APT
AVENUE	AVE
BEDROOM	BDRM
BOULEVARD	BLVD
BRITISH COLUMBIA	BC
BROTHERS	BROS
CAISSE POPULAIRE	CAISSE POP
CHEVROLET	CHEV
CHRYSLER	CHRYS
CIRCLE	CIR
CONCESSION	CON, C
CONSTRUCTION	CONST
CONVERTIBLE	CONV
CO-OPERATIVE	CO-OP
COUPE	CPE
COURT	CT
CREDIT UNION	CREDIT U
CRESCENT	CRES
DELIVERY VAN	DEL VAN
DINING ROOM	DR
DRIVER	DR
EAST	E
EQUIPMENT	EQPT
4 DOOR HARDTOP	4DR HDTP
HALF	HLF, ½
HATCH BACK	HTCH BK
HIGHWAY	HWY

INCH, IN	IN
INTERNATIONAL	INTL
INTERNATIONAL HARVESTER	IHC
JOHN DEERE	JD
LIVING ROOM	LR
LOT	L
MANITOBA	MAN
MASSEY FERGUSON	MF
MOTORCYCLE	MTRCYCLE
MOTORS	MTRS
NEW BRUNSWICK	NB
NEWFOUNDLAND	NFLD
NORTH	N
NORTHWEST TERRITORIES	NWT
NOVA SCOTIA	NS
OLDSMOBILE	OLDS
½	A HALF
½ TON PICKUP TRUCK	½ T PU
½ TON TRUCK	½ T TRK
ONTARIO	ONT
PLYMOUTH	PLY
PONTIAC	PONT
PRINCE EDWARD ISLAND	PEI
QUARTER	QTR, ¼
QUEBEC	QUE
RAMBLER	RAMBL
ROAD	RD
RURAL ROUTE	RR
SASKATCHEWAN	SASK
SEDAN	SDN
SERIAL NUMBER	SERIAL
SOUTH	S
STATION WAGON	STN WGN
STREET	ST
SUITE	STE
SUPERSPORT	SS
TELEVISION	TV
¾ TON TRUCK	¾ T TRK
TON	T
TOWNSHIP	TWSP, TWP
VOLKSWAGEN	VW
WEST	W
YUKON	YUK

20 Feb 81 cP-6.1 Reg 1.

APPENDIX V

Spacing on Financing Statements and Financing Change Statements

COLUMN 1	COLUMN 2
Your reference #	7 characters
Lines B, U — Secured Party/Registrant Name	50 characters
Lines C, F, I, V — Address	28 characters
— City	16 characters
Lines D, G — Individual Debtor Surname	18 characters
— Individual Debtor First Name	12 characters
— Individual Debtor Second Name	12 characters
Lines E, H — Business Debtor Name	50 characters
Line J — Amounts	12 characters
Lines K, L, M, N — Vehicle Description Lines	
— Serial Number	18 characters
— Make/Model	24 characters
Lines O, P, Q, R, S, W, X, Y	50 characters
Lines T, Z — Information	49 characters
Pages of financing statements	3 characters
Pages of financing change statements	2 characters
Page to be amended on a financing change statement	3 characters

20 Jly 84 SR 75/84.

FORM 1

Requisition for Notice to Discharge

Subsection 43(1)

Address
Date

To: The Personal Property Registrar

I, *(here state full name and address)*, require you to serve a notice to discharge on the secured party(ies) named in the financing statement (*or* financing change statement, *as the case may be*) bearing registration number ______________ and registered on *(here insert date)* with respect to the collateral described as follows:

(If the notice to discharge is required with respect to all collateral described on a financing statement or a financing change statement relating thereto, the requisition may so state.)

I served a written demand on the secured party(ies) by *(here state method of service)* on *(here state date demand was served or mailed)* at *(here state the address of service used)* and 15 days has expired from service of the said demand.

I claim my interest as *(here state whether as owner, debtor or other person having an interest in the collateral)*.

The secured party's(ies') address(es) is (are):

(Here state the full address and postal code.)

Dated this ________________ day of ________________________ , 19____ .

____
Signature

20 Feb 81 cP-6.1 Reg 1.

FORM 2

Notice to Discharge
Subsection 43(2)

Personal Property Registry
Address
Date

To: Name of Secured Party

Address

Pursuant to section 50 of *The Personal Property Security Act*, and upon the requisition of *(here state name and address of person requiring notice to be sent)*, I hereby notify you that the financing statement or financing change statement registered by you *(or* on your behalf *or* by your assignor, *as the case may be)* on the ____________ day of ____________, 19____, claiming an interest in collateral described as follows:

(If the notice to discharge is required with respect to all collateral described on a financing statement or a financing change statement relating thereto, the notice may so state.)

will be discharged at the expiration of 40 days from service of this notice upon you unless within the said 40 days you register with me an order of a judge of Her Majesty's Court of Queen's Bench for Saskatchewan maintaining your interest, accompanied by a financing change statement in the form prescribed in *The Personal Property Regulations*.

Dated this ____________ day of ____________, 19____.

____
Personal Property Registrar

20 Feb 81 cP-6.1 Reg 1.

FORM 3

Notice for Filing in Land Titles Office
Subsection 45(1)

To: The Registrar of Land Titles at ____________, Saskatchewan.

I(We), *(here state full name and address of the secured party)* hereby give notice that a security interest has been created by *(here state name and address of debtor)* in *(here provide a brief description of collateral which is or may become fixtures)*.

The following is a description of the land upon which the goods are located or are affixed or are to be affixed:

The amount owing with respect to the security interest in the goods is *(here give the amount owing in dollars and cents)*.

The registration life of this notice is *(here choose from multiples of one year or an infinite number of years)*.

The address within Saskatchewan at which notices may be served on the secured party is as follows:

This notice is given for the purpose of filing in the Land Titles Office at ____________, Saskatchewan.

Dated this ____________ day of ____________, 19____.

Signed by the above
named ____________
in the presence of

____
Witness

____
Secured Party or Agent

20 Feb 81 cP-6.1 Reg 1.

FORM 4

Notice for Filing in Land Titles Office

Subsection 45(2)

To: The Registrar of Land Titles at ____________________, Saskatchewan.

The notice of security interest of *(here state name and address of the secured party)* upon the land described as:

Dated the ______ day of ______________, 19____, and registered the ______ day of ____________________, 19____, as Instrument Number __________, is hereby (renewed, subordinated, amended, assigned, discharged *or* partially discharged).

Select the appropriate form:

Renewal	The notice is renewed for *(here select from multiples of one year or an infinite number of years)*.
Subordination	The notice is subordinated to the interest of *(here state name and address of person to whom the interest is being subordinated)* under Instrument Number *(here give Instrument Number and general description of the nature of interest being given priority)*.
Amendment	The notice is amended by *(here give particulars of amendment)*.
Discharge	The notice of security interest is wholly discharged.
Partial discharge	The notice is partially discharged as it relates to the land described as: *(here describe the land to which the goods are affixed)*.
Assignment	The interest of the secured party referred to in the notice has been assigned to *(here state full name and address of the assignee)* whose address for service in Saskatchewan is *(here state the address in Saskatchewan where notices may be served)*.

Dated this ________ day of ____________________, 19__.

Signed by the above
named ____________________
in the presence of

____________________ ____________________
Witness *Secured Party or Agent*

20 Feb 81 cP-6.1 Reg 1.

FORM 5

Affidavit of Execution

Subsection 45(3)

PROVINCE OF SASKATCHEWAN
TO WIT:

I, *A. B.*, of *(here state address and occupation)* MAKE OATH AND SAY:

1 That I was personally present and did see ____________ named in the within *(or annexed)* Instrument, who is personally known to me to be the person named therein, duly sign and execute the same for the purposes named therein.

2 That the same was executed at the City of __________, in the Province of ____________, and that I am the subscribing witness thereto.

3 That I, ____________, know the said ____________ and he is in my belief 18 years of age or more.

SWORN BEFORE ME AT
____________________________ in the
Province of ________________________
this __________ day of ______________ ,
19_____ .

______________________________ ______________________________

A Commissioner, etc.
(or as the case may require).

Signature

20 Feb 81 cP-6.1 Reg 1

FORM 6

Affidavit Verifying Notice

(Subsection 45(3))

PROVINCE OF SASKATCHEWAN
TO WIT:

I, A.B., of *(here state address and occupation)* MAKE OATH AND SAY:

1 That I am the duly authorized agent of the secured party named in the notice hereto attached, and I have a full knowledge of the facts set out therein.

2 That the statement of facts set out in the said notice is true.

SWORN BEFORE ME AT
____________________________ in the
Province of ________________________
this __________ day of ______________ ,
19_____ .

______________________________ ______________________________

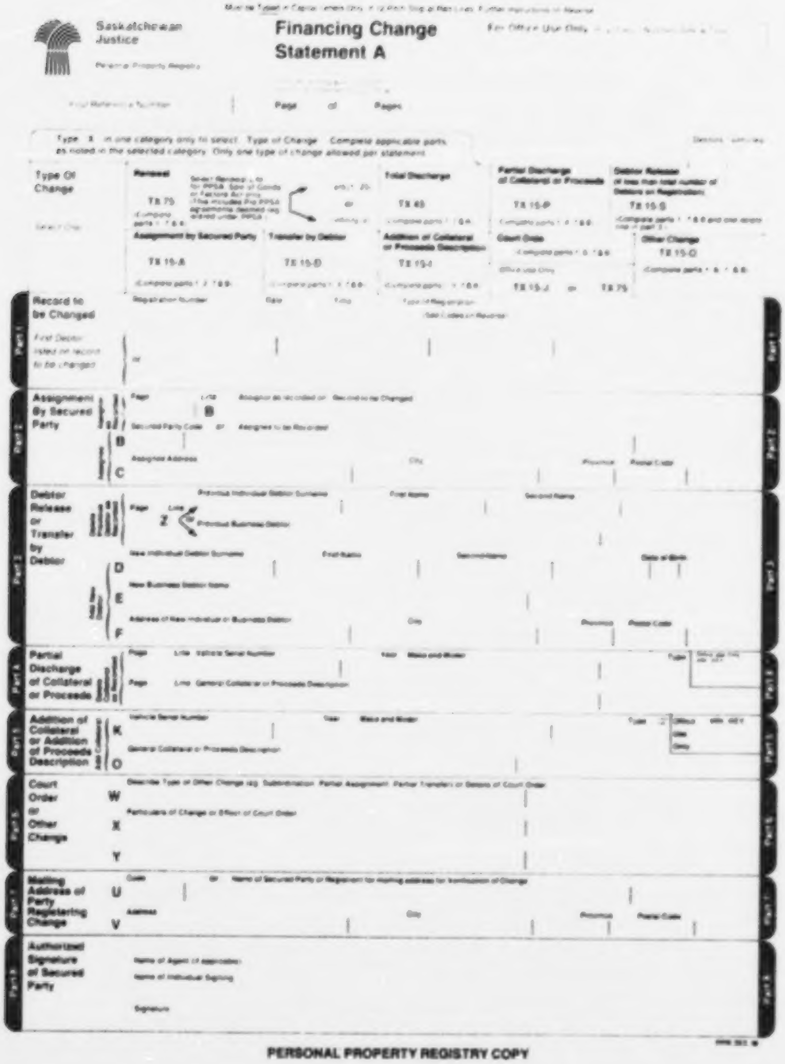
A Commissioner, etc.
(or as the case may require).

Signature

20 Feb 81 cP-6.1 Reg 1.

APPENDIX B

FORMS



Saskatchewan Justice

Financing Change Statement A

Page of Pages

Type Of Change

Renewal TX 75

Total Discharge

Partial Discharge of Collateral or Proceeds TX 15-P

Debtor Release TX 15-S

Assignment by Secured Party TX 15-A

Transfer by Debtor TX 15-D

Addition of Collateral or Proceeds Description TX 15-I

Court Order

TX 15-J or TX 75

Other Change TX 15-O

Part 1 Record to be Changed

Part 2 Assignment By Secured Party

Part 3 Debtor Release or Transfer by Debtor

Part 4 Partial Discharge of Collateral or Proceeds

Part 5 Addition of Collateral or Addition of Proceeds Description

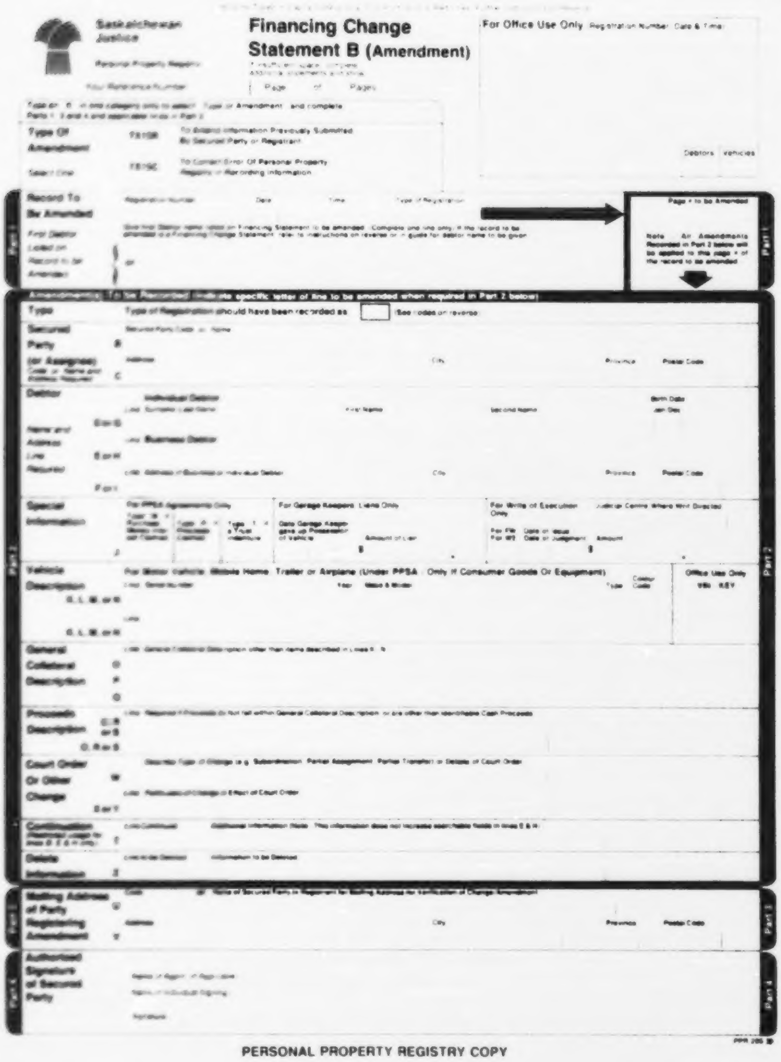
Part 6 Court Order or Other Change

Part 7 Mailing Address of Party Registering Change

Part 8 Authorized Signature of Secured Party

PERSONAL PROPERTY REGISTRY COPY

APPENDIX B



Saskatchewan Justice

Personal Property Registry

Your Reference Number

Financing Change Statement B (Amendment)

Page of Pages

For Office Use Only Registration Number Date & Time

Debtors Vehicles

Type Of Amendment

To Amend Information Previously Submitted By Secured Party or Registrant

To Correct Error Of Personal Property Registry in Recording Information

Select One

Part 1

Record To Be Amended Registration Number Date Time Type of Registration

First Debtor Listed on Record to be Amended

Page # to be Amended

Note: All Amendments Recorded in Part 2 below will be applied to this page # of the record to be amended

Part 2

Amendments (To be Recorded) Indicate specific letter of line to be amended when required in Part 2 below)

Type Type of Registration should have been recorded as ☐ (See codes on reverse)

Secured Party (or Assignee) Address City Province Postal Code

Debtor Individual Debtor First Name Second Name Birth Date

Business Debtor

City Province Postal Code

Special Information For PPSA Agreements Only | For Garage Keepers' Liens Only | For Writs of Execution Only

Date Garage Keeper gave up Possession of Vehicle Amount of Lien $

Judicial Centre Where Writ Directed Amount $

Vehicle Description For Motor Vehicle, Mobile Home, Trailer or Airplane (Under PPSA: Only If Consumer Goods Or Equipment)

Year Make & Model Type Colour Code

Office Use Only VIN KEY

General Collateral Description

Proceeds Description

Court Order Or Other Change

Continuation

Delete Information Information to be Deleted

Part 3

Mailing Address of Party Registering Amendment Address City Province Postal Code

Part 4

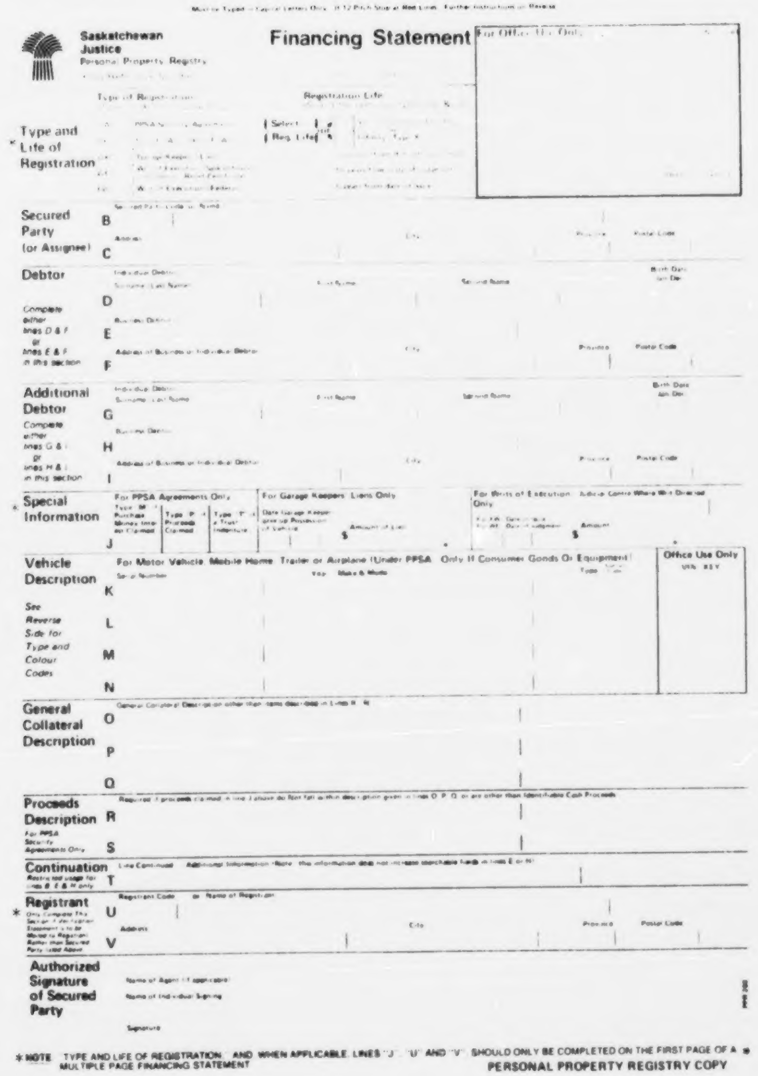
Authorized Signature of Secured Party

Signature

PPR 205 B

PERSONAL PROPERTY REGISTRY COPY

APPENDIX B



Must be Typed – Capital Letters Only … 12 Pitch Stop at Red Lines. Further Instructions on Reverse

Saskatchewan
Justice
Personal Property Registry

Financing Statement

For Office Use Only

Type and Life of Registration *

Type of Registration

Registration Life

Select Reg. Life

Secured Party (or Assignee)

B Secured Party Code or Name

C Address | City | Province | Postal Code

Debtor

Individual Debtor

D Surname (Last Name) | First Name | Second Name | Birth Date

Complete either lines D & F or lines E & F in this section

E Business Debtor

F Address of Business or Individual Debtor | City | Province | Postal Code

Additional Debtor

Individual Debtor

G Surname (Last Name) | First Name | Second Name | Birth Date

Complete either lines G & I or lines H & I in this section

H Business Debtor

I Address of Business or Individual Debtor | City | Province | Postal Code

Special Information *

J For PPSA Agreements Only | For Garage Keepers' Liens Only | For Writs of Execution … Only

Date Garage Keeper gave up Possession of Vehicle | $ Amount of Lien | $ Amount

Vehicle Description

For Motor Vehicle, Mobile Home, Trailer or Airplane (Under PPSA, Only If Consumer Goods Or Equipment)

Serial Number | Year | Make & Model | Type

Office Use Only

See Reverse Side for Type and Colour Codes

K

L

M

N

General Collateral Description

O

P

Q

Proceeds Description

For PPSA Security Agreements Only

R

S

Continuation

T Line Continued | Additional Information

Registrant *

U Registrant Code or Name of Registrant

V Address | City | Province | Postal Code

Authorized Signature of Secured Party

Name of Agent (if applicable)

Name of Individual Signing

Signature

* NOTE: TYPE AND LIFE OF REGISTRATION, AND WHEN APPLICABLE, LINES "J", "U" AND "V" SHOULD ONLY BE COMPLETED ON THE FIRST PAGE OF A MULTIPLE PAGE FINANCING STATEMENT

PERSONAL PROPERTY REGISTRY COPY

APPENDIX C

TABLE OF CONCORDANCE WITH UNIFORM COMMERCIAL CODE

A massive and often overlooked body of jurisprudence can be found in the United States decisional law. The table of concordance that follows identifies analogous statutory provisions contained in Article 9 (and as well, other applicable portions of the Uniform Commercial Code). The relevance of case law from the United States will vary. In some cases, the wording of the Saskatchewan PPSA is virtually identical to that in the UCC. In other cases there are significant departures. For example, the registration system contained in Part IV of the Saskatchewan Act is so different that the Article 9 provisions are of little value.

Sask. PPSA	Definition	U.C.C. 1972 (except as otherwise noted)
2(a)	"accessions"	9-314(1)
2(b)	"account"	9-106
2(c)	"building"	9-313(2)
2(d)	"building materials"	9-313(2)
2(e)	"chattel paper"	9-105(1)(b)
2(f)	"collateral"	9-105(1)(c)
2(g)	"consignment"	2-326
2(h)	"consumer goods"	9-109(1)
2(i)	"court"	— —
2(j)	"creditor"	1-201(12)
2(k)	"debtor"	9-105(1)(d)
2(1)	"default"	— —
2(m)	"document of title"	1-201(15)
2(n)	"equipment"	9-109(2)
2(o)	"financing change statement"	9-402
2(p)	"fixtures"	9-313(1)(a)
2(q)	"fungible"	1-201(17)
2(r)	"future advance"	9-105(k)
2(s)	"goods"	9-105(1)(h)
2(t)	"indebtedness"	— —
2(u)	"instrument"	9-105(1)(i)
2(v)	"intangible"	9-106
2(w)	"inventory"	9-104(4)
2(x)	"judge"	— —
2(y)	"lease for more	

Sask. PPSA	Definition	U.C.C. 1972 (except as otherwise noted)
	than one year"	— —
2(z)	"money"	1-201(24)
2(aa)	"obligation secured"	— —
2(bb)	"pawnbroker"	— —
2(cc)	"person"	1-201(28),(30)
2(dd)	"prescribed"	— —
2(ee)	"proceeds"	9-306(1)
2(ff)	"purchase"	1-201(32)
2(gg)	"purchase-money security interest"	9-107
2(hh)	"purchaser"	1-201(33)
2(ii)	"registrar"	— —
2(jj)	"registry"	— —
2(kk)	"secured party"	9-105(1)(m)
2(11)	"security"	8-102
2(mm)	"security agreement"	9-105(1)(1)
2(nn)	"security interest"	1-201(37)
2(oo)	"specific goods"	— —
2(pp)	"trust indenture"	— —
2(qq)	"value"	1-201(44)
3		9-102,9-202
4(a)		9-104(c)
4(b)		9-104(g)
4(c)		9-104(d)
4(d)		9-104(f)
4(e)		9-104(j)
4(f)		— —
4(g)		9-104(f)
4(h)		9-104(f)
4(i)		9-104(k)
4(j)		9-302(g)
5(1)		9-103(1)(a),(b)
5(2)		9-103(1)(d)
5(3)		— —
5(4)		— —
6(1)		9-103(1)(c)
6(2)		— —
7(1)		9-103(4),9-103(a),(b)
7(2)		9-103(3)(d)
7(3)		9-103(3)(e)
7(4)		9-103(3)(c)
7(5)		— —
7(6)		9-103(5)

Sask. PPSA	U.C.C. 1972 (except as otherwise noted)
8(1)	— —
8(2)	— —
8(3)	— —
8(4)	— —
9	9-201
10(1)	9-203(1)
10(2)	9-203(3)
11	— —
12(1)	9-203(1),(2)
12(2)	— —
12(3)	9-204(2): 1962 U.C.C.; deleted in 1972 U.C.C.
13(1)	9-204(1)
13(2)	9-204(4): 1962 U.C.C.; deleted in 1972 U.C.C.
14(1)	9-204(3)
14(2)	— —
15	9-206(2)
16	1-208
17(1)	9-207(1)
17(2)	9-207(2)
17(3)	9-207(2)(e)
17(4)	9-207(3)
17(5)	9-207(4)
18(1)	9-208(1)
18(2)	— —
18(3)	9-208(2)
18(4)	— —
18(5)	— —
18(6)	9-208(2)
18(7)	9-208(2)
18(8)	— —
18(9)	9-208(3)
18(10)	— —
19	9-303(1)
20(1)	9-301
20(2)	9-301(3),(4)
21	9-301(2)
22	— —
23(1)	9-303(2)
23(2)	9-302(2)
24(1)	9-304(1),9-305
24(2)	9-205

Sask. PPSA	U.C.C. 1972 (except as otherwise noted)
25	9-302(1),9-304(1)
26(1)	9-304(4)
26(2)	9-304(5)
26(3)	9-304(6)
27(1)	9-304(2),(3)
27(2)	9-304(2)
27(3)	9-304(2)
27(4)	— —
28(1)	9-306(2)
28(2)	9-306(3)
28(3)	9-306(3)
29(1)	9-306(5)(a)
29(2)	9-306(5)(a)
29(3)	9-306(5)(b)
29(4)	9-306(5)(c)
29(5)	9-306(5)(d)
30(1)	1-201(9), 9-307(1)
30(2)	— —
30(3)	— —
30(4)	1-201(9)
30(5)	9-307(2)
31(1)	— —
31(2)	— —
31(3)	9-308
31(4)	9-309
31(5)	9-308
32	9-310
33	9-311
34(1)	9-312(4)
34(2)	9-312(3)
34(3)	9-312(3)
34(4)	9-312(3)
34(5)	— —
34(6)	9-312(2)
35(1)	9-312(5)
35(2)	9-312(5)
35(3)	9-312(6)
35(4)	9-312(7)
35(5)	— —
35(6)	— —
35(7)	— —
36(1)	9-313(4)(b),(5),(7)
36(2)	9-313(4)(d),(7)

Sask. PPSA	U.C.C. 1972 (except as otherwise noted)
36(3)	9-313(4)(a)
36(4)	9-313(8)
36(5)	9-313(8)
36(6)	9-313(8)
36(7)	— —
36(8)	— —
36(9)	— —
36(10)	— —
36(11)	— —
37(1)	9-314(1),(2)
37(2)	9-314(3)
37(3)	— —
37(4)	9-314(4)
37(5)	9-314(4)
37(6)	9-314(4)
37(7)	— —
37(8)	— —
37(9)	— —
37(10)	— —
37(11)	— —
38(1)	9-315(1)
38(2)	9-315(2)
38(3)	9-314(1)
39	9-316
40(1)	9-318(1)
40(2)	9-318(2)
40(3)	9-318(2)
40(4)	9-318(3)
40(5)	9-318(3)
40(6)	9-318(4)
41	— —
42(1)	— —
42(2)	— —
42(3)	— —
43(1)	9-407
43(2)	— —
43(3)	— —
43(4)	— —
43(5)	— —
43(6)	— —
43(7)	— —
43(8)	— —
44(1)	— —

Sask. PPSA	U.C.C. 1972 (except as otherwise noted)
44(2)	9-402(1)
45(1)	9-405(2)
45(2)	9-405(2)
45(3)	9-405(1)
45(4)	9-405(3)
45(5)	— —
46	9-402(4)
47	— —
48(1)	9-403(3)
48(2)	— —
48(3)	9-403(3)
49(1)	9-402(7)
49(2)	9-402(7)
49(3)	— —
49(4)	9-402(7)
50(1)	9-404(1)
50(2)	9-404(1)
50(3)	9-404(1)
50(4)	— —
50(5)	— —
50(6)	— —
50(7)	— —
50(8)	— —
51	— —
52(1)	— —
52(2)	— —
52(3)	— —
52(4)	— —
52(5)	— —
52(6)	— —
53(1)	— —
53(2)	— —
53(3)	— —
53(4)	— —
53(5)	— —
53(6)	— —
53(7)	— —
53(8)	— —
53(9)	— —
53(10)	— —
53(11)	— —
53(12)	— —
54(1)	9-403(7)

Sask. PPSA	U.C.C. 1972 (except as otherwise noted)
54(2)	— —
54(3)	— —
54(4)	— —
54(5)	— —
54(6)	— —
54(7)	— —
55(1)	9-501(1)
55(2)	— —
55(3)	9-501(1)
55(4)	9-501(4)
55(5)	— —
56(1)	— —
56(2)	— —
56(3)	— —
56(4)	— —
56(5)	9-501(1)
56(6)	9-501(1)
56(7)	9-501(2)
56(8)	9-501(3)
57(1)	9-502(1)
57(2)	9-502(2)
58	9-503
59(1)	9-504(1)
59(2)	9-504(3)
59(3)	9-504(3)
59(4)	9-504(3)
59(5)	— —
59(6)	9-504(3)
59(7)	— —
59(8)	— —
59(9)	— —
59(10)	— —
59(11)	9-504(3)
59(12)	9-504(4)
59(13)	— —
59(14)	9-504(5)
59(15)	9-504(3)
60(1)	9-504(1),(2)
60(2)	9-504(1)
60(3)	9-504(2)
61(1)	9-505(1)
61(2)	9-505(1)
61(3)	9-505(1)

Sask. PPSA	U.C.C. 1972 (except as otherwise noted)
61(4)	— —
61(5)	— —
61(6)	— —
61(7)	9-504(4)
61(8)	— —
62(1)	9-506
62(2)	— —
63	9-507(1)
64(1)	1-203
64(2)	9-507(1)
64(3)	— —
64(4)	— —
64(5)	1-103
65	— —
66(1)	9-402(8)
66(2)	— —
67(1)	— —
67(2)	— —
67(3)	— —
67(4)	— —
68	— —
69(1)	— —
69(2)	— —
69(3)	— —
70(1)	— —
70(2)	— —
70(3)	— —
71(1)	10-102(2)
71(2)	10-102(2)
71(3)	10-102(2)
71(4)	— —
72(1)	— —
72(2)	— —
72(3)	— —
72(4)	— —
72(5)	— —
72(6)	— —
72(7)	— —
72(8)	— —
73	— —
74	— —